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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 938

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI — Petitioner

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI — Petitioner

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mrs. Walter Lewis, hereinafter referred to as Lewis, petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment against her entered on December 6, 1963, (R. 203; App. 5, A 16-17), pursuant to its opinion of that date, in *Kennedy vs. Lewis*, and reverse title, 325 F. 2d 210, (R. 199, App. 4, A13); Lewis', *timely filed petition for rehearing* with supporting brief was *denied* on *January 28, 1964*, (R. 259, App. 6, A18). Stays of the Fifth Circuit Mandate were granted (Apps. 7 & 7A, A19 & 20) to permit the filing of, and orderly action upon, this Petition for Certiorari.

INTRODUCTORY STATEMENT

Strange as though it may seem, the Record here shows that:

1. "*Secret Evidence*", or, "*secret charges*", if any, known only to respondent and his predecessor — never disclosed to said Courts below — never disclosed to Lewis — and which she never had any opportunity to disprove was the sole basis of the judgment order and opinion and judgment of the courts below, here sought to be reviewed; said "secret evidence", or "secret charges", were only *conclusionarily alleged* in the complaint as the reasons why respondent said he was entitled to the order judgments in the courts below under Title 42, USCA, 1974d.

2. *There was no evidence or proof of any kind below to support said conclusionary allegations of respondent's complaint* — even though Lewis had challenged the legal sufficiency of and factual existence or foundation for the said reasons by motions to dismiss and direct denials thereof in her answer.

3. Lewis, the sole defendant below, *was denied the implicit, inherent and indispensible right given her* by the *clear terms* and even the authoritative legislative history of said Section 1974d — and was also denied the inherent and implicit right as a defendant in this case or controversy — to have her day in court, to require the plaintiff to prove his case, if any, against her; and to have the District Court, *before rendering judgment*, consider or take into consideration and exercise its judicial judgment upon the evidence, if any he had, which the respondent should have introduced, and both her denial of its factual existence and her evidence of those denials; and the legal insufficiency of the al-

legations of the complaint stating the reasons why respondent alleged he was entitled to a judgment order of the District Court commanding her to perform an affirmative act, which she was under *no obligation or duty to commit or perform* except pursuant to a valid judgment order of the District Court.

4. Lewis, defendant below, was denied any opportunity to disprove said allegations of respondent's complaint and any evidence which he should have adduced in support thereof and to prove her denials thereof in her answer thereto.

5. The complaint (mis-named an application) filed in the District Court was an unsworn complaint or document; no affidavits of any kind were submitted in support thereof.

6. Respondent, plaintiff below, even failed and refused to offer evidence to the District Court in support of his said allegations when offered the opportunity to do so — he stood as making a motion for a judgment on the pleadings — in the face of Lewis' denials in her answer of respondent's said allegations.

7. The denials by Lewis in her answer of the factual existence of or foundation for said reasons so alleged by plaintiff below were left hanging in "mid-air" — never considered by the Courts below.

8. The District Court, contrary to its own view of this cause (R. 176-179) entered the judgment order (App. 2, A8-10, R. 181-182) solely because he felt bound by the language of the Fifth Circuit in *Kennedy vs. Lynd*, 306 F. 2d 222 (App. 8, A21-36), hereinafter fully discussed.

The Record here, for *clarity, demands* the foregoing and following Introductory Statement before considera-

tion of subsequent portions of this petition; especially before the presentation of the questions presented.

For brevity hereinafter, whenever we refer to Section 1974, 1974a-1974e we, of course, mean those sections of Title 42, USC; subsequent references to those sections will be without the aforedesignated title and compilation unless the circumstances at the point of mention demand the total designation of the title and compilation.

The proceeding below in the District Court under 1974d was begun as an adversary proceeding — a case or controversy — not an ex parte proceeding. Thus, throughout this petition, we use the word "complaint" instead of the word "application"; likewise, Rogers, for whom Kennedy was substituted when the latter became Attorney General of the United States on January 21, 1961, was therefore the plaintiff; likewise, Lewis is the defendant.

Due to the *voluminous nature* of the appendix to this petition, we are printing it as a separate document; as such, it will be handier to any examiner hereof than his having to flip backward and forward in one document in the course of examining any comments upon the contents of the appendix; for convenience, we place an index to the Appendix in the fore part of this document and at the same point in the separately printed Appendix.

If any examiner hereof should desire to inspect the allegations of the complaint stating the reasons upon which respondent relied in the District Court as entitling him to an order judgment thereof, they will be found by reference (R. 2, par. IV, and R. 5, par. 2), "*** information **jurisdiction".

Lewis' denials of those allegations are found in her answer (R. 142, par. 4, R. 143, par. 1).

Lewis is not claiming, and has never claimed, any privilege against self-incrimination — that is not in this case.

Among other errors and denials by the Courts below, Lewis claims a deprivation of due process of law, both substantive and procedural — both as to her liberty — her freedom from restraint or control by the District Court exhibited by its affirmative command forcing her to commit or perform or do an act which she would not otherwise be required to do and could not be otherwise required to do in this case upon this Record — without her having received due process of law in the proceedings culminating in that order; and as she did below, she questions the existence of jurisdiction in the District Court and the Fifth Circuit when the order was issued by the District Court if at that time the case or controversy had ceased to exist by virtue of her being prohibited, or not permitted, to litigate or challenge the legal sufficiency and the factual existence or the factual foundation for, or of, the conclusionary allegations in respondent's petition stating the reasons why he was entitled to a judgment order of the District Court under said Section 1974d.

OPINIONS BELOW

Though some of these have been stated above, the holding, substance and sequence of the opinions, judgments, or orders below in this cause have important significance on this Petition; those which are reported show the report thereof; *all others are unreported*; they are:

November 16, 1962 — Order of District Court (R. 181, App. 2, A8), from which *both parties* appealed to the Fifth Circuit;

September 18, 1963 — Per curiam opinion or order of Fifth Circuit, (R. 197, App. 3, A11), *denying* Kennedy's, Appellant below, motion for summary reversal and to summarily affirm as to Lewis', Appellee-Appellant, appeal;

November 15, 1963 — Argument and submission (App. 3-A, A12);

December 6, 1963 — Opinion of Fifth Circuit, *Kennedy vs. Lewis*, (and reverse title) 325 F. 2d 210, (R. 199, App. 4, A13);

Judgment of Fifth Circuit of same date entered thereon (R. 203, App. 5, A16), review of which this petition seeks;

January 28, 1964 — Per curiam opinion or order of Fifth Circuit *denying* [illegible] timely filed petition for rehearing (R. 259, App. 6, A17);

February 20 and March 9, 1964 — Orders by Chief Judge Elbert P. Tuttle of Fifth Circuit (Apps. 7, & 7A, A19, 20), granting and extending Lewis a stay of its mandate through March 21, 1964, and until this Court acts thereon, to enable her to file this Petition and accompanying documents.

To ascertain the grounds of the opinion and judgment of the Fifth Circuit in *Kennedy vs. Lewis*, supra, entered December 6, 1963, and for a complete understanding thereof the opinions in the two cases upon which the Lewis opinion is predicated (R. 199, 200, App. 4, A13, 14) must be presented; they are *Kennedy vs. Land* and *Kennedy vs. Owen*, infra, and the proceedings of the

District Court therein from which the appeals were taken; the Judgment Orders and the opinions of the District Court and the Fifth Circuit proceedings in *Lynd and Owen* are copied in the separately printed Appendix hereto and they are:

1. *Kennedy vs. Lynd* (App. 8, A21-36) — 306 F. 2d 222 (5 Cir., July 11, Reh. Den. Aug. 8, 1962), Cert. Den. (366 U. S. 952, 9 L. Ed. 2d 500) 1963;

2. *Kennedy vs. Lynd* (In Re Application Theron C. Lynd) (App. 9, A37), District Court Opinion January 15, 1962;

3. *Kennedy vs. Lynd* (App. 10, A40) District Court order on above opinion, February 16, 1962, — Appealed to Fifth Circuit;

4. *Kennedy vs. Owen, et al* (App. 11, A41-44), 321 F. 2d 116 (5 Cir., July 3, 1963); Stay denied July 19, 1963, 84 S. Ct. 12, 11 L. Ed. 2d 18;

5. *Kennedy vs. Owen*, et al (App. 12, A45), District Court order or judgment June 11, 1963; No Opinion; Appealed to Fifth Circuit.

JURISDICTION

The Judgment of the Fifth Circuit, here sought to be reviewed, was entered December 6, 1963, (R. 203, App. 5, A16) pursuant to its opinion of the same date, *Kennedy vs. Lewis*, 325 F. 2d 210 (1963) (R. 199, App. 4, A13); The petition of Lewis for rehearing thereof was denied by Fifth Circuit on January 28, 1964, (R. 259, App. 8, A21). The jurisdiction of this Court is invoked pursuant to Title 28 USC, Sec. 1254(1) (App. 1, A2).

QUESTIONS PRESENTED

1. In the adversary proceeding, the case or controversy, prosecuted by Kennedy against Lewis under Title

42 U.S.C., Section 1974d, did the Courts below err in entering "an automatic judgment" for Kennedy upon "secret evidence", if any, not disclosed to said Courts, consisting of only the conclusionary allegations of the complaint stating the conclusionary reasons why he claimed he was entitled to a judgment or order, unsupported by any evidence, thus unknown to Lewis, and which conclusionary allegations Lewis denied in her answer as therein set out; but upon which issues of fact so created, there was *no hearing of any kind by any Court at any time*; and did said Courts err in holding that Lewis could not defend herself and in predicating their said holdings or judgments or orders upon the two Fifth Circuit cases cited as *Kennedy v. Ladd* and *Kennedy v. Odom*, supra and infra.

2. Did the Courts below err in holding that though this was a case instituted and begun in the District Court under said Section 1974d as an adversary proceeding, a case of controversy, *Lewis could not defend herself against the charges made against her and could not litigate or challenge the legal sufficiency of, or the factual existence of, or foundation for*, the allegations of the complaint conclusionarily stating the reasons why Kennedy alleged he was entitled to a judgment or order of said Court commanding Lewis *to perform the affirmative act* of making the records and documents involved available for Kennedy's inspection and reproduction; and did the Court in so holding that Lewis could not defend the charges made against her deny Lewis' inherent and implicit rights as a defendant in such a case given to her by the terms of said Section 1974d; and did said Courts deny Lewis her rights of both substantive and procedural due process of law, including a denial of her liberty and a denial of her property right

or interest as a bailee for hire of said records, or both, under the Fifth Amendment to the Constitution of the United States; and did said Courts deny her right to have said District Court determine on the merits her right to confrontation under the Sixth Amendment if the reasons alleged by Kennedy in said Complaint were held by the District Court to be sufficient to entitle him to a judgment or order of said Court as requested by him.

3. Did the Courts below err in denying, *without giving any consideration to the legal merits thereof*, Lewis' Motion to Dismiss the complaint for its failure to state a claim upon which relief could be granted, her motion for a decree in her favor when Kennedy failed to adduce any evidence to support the allegations of the complaint, which stated the reason why Kennedy was entitled to a judgment or order of the District Court and which allegations Lewis had denied in her answer, or either, and her other motions to dismiss filed in the District Court.

4. Did the Courts below err in granting Kennedy any relief; and did the District Court and the Fifth Circuit *have jurisdiction* under Article III, Section 2 of the Constitution of the United States to grant Kennedy any relief when the judgment or order of the District Court was entered, if, prior thereto, at that time, and since, the proceedings in the District Court had ceased to be a case or controversy because of their holding that Lewis had no right to litigate, dispute, and challenge the legal sufficiency of and the factual existence of, or the factual foundation for, the reasons as conclusionarily alleged by Respondent, in the complaint as entitling him to a judgment or order of the District Court as requested by him.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following Constitutional provisions and Statutes of the United States, some Statutes of the State of Mississippi, and certain Federal Rules of Civil Procedure, the full text of which has been copied in the separately printed appendix hereto, except those which are presently quoted in this portion of the Petition:

1. The following portion of Article III, Secs. 1 and 2, of the Constitution of the United States:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— * * * to Controversies * * * *"

2. The following portion of Rule 8 of the Federal Rules of Civil Procedure:

"(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial."

3. Amendment V to the Constitution of the United States . . . A1.
4. Amendment VI to the Constitution of the United States . . . A1.
5. Title 28, USC, Sec. 1254(1) . . . A2.
6. Title 42, USC, Sec. 1974 . . . A2-3.
7. Title 42, USC, Sec. 1974a . . . A3.
8. Title 42, USC, Sec. 1974b . . . A3.
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10. Title 42, USC, Sec. 1974d . . . A4.
11. Title 42, USC, Sec. 1974e . . . A4.
12. Title 28, USC, Sec. 1291 . . . A4.
13. Title 28, USC, Sec. 2101 . . . A4-5.
14. Title 18, USC, Sec. 242 . . . A5.
15. Rule 1, Federal Rules of Civil Procedure . . . A5.
16. Rule 81(a)(3) . . . A6.

The following sections of the Mississippi Code of 1942, Annotated, Recompiled:

17. Sec. 2106 . . . A6.
18. Sec. 2111 . . . A6-7.
19. Sec. 3275 . . . A7.

STATEMENT OF THE CASE

In the "Introductory Statement" to this petition, pages 2-3 hereof, supra, we have said that the judgment of the Courts below were predicated, made or based: solely and alone on "secret evidence" or "secret charges", if any, and never disclosed to any Court or Lewis; *without any hearing of any kind* on the conclusionarily alleged reasons alleged by Respondent in his complaint filed in the District Court, purporting to constitute *the reasons why he was entitled to a judgment order commanding defendant, Lewis, to perform the affirmative acts* of producing the records involved for inspection

and re-production by Respondent. We said also that Lewis was never permitted or given an opportunity to be heard upon her answer denying said allegations to disprove said conclusionarily alleged reasons nor was plaintiff ever required to produce evidence in support of said allegations; and without any judicial hearing upon or disposition or decision upon Lewis' various motions filed below.

This is so, and such occurred because the Courts below held, predicated upon *Lynd* and *Owen* from the Fifth Circuit, supra, that the legal sufficiency of and the factual existence or foundation for said reasons were not open or subject to Judicial review or ascertainment. (Kennedy v. Lynd, 306 F. (2) 222, Sections 6 and 8. of Opinion, page 226).

In this "Statement of the Case", we will demonstrate the above; but only after we have *first referred* to the jurisdiction or lack thereof of the District Court under the peculiar circumstances of this case.

In accordance with the Rules of this Court, *we first refer to the jurisdiction of the District Court.* The jurisdiction of the District Court below was invoked under Title 42, USC, Section 1974b. Such jurisdiction continued to exist in the District Court and Appellate Court below as an Appellate Court, *unless the District Court lost jurisdiction of this case, or jurisdiction thereof ceased to exist, prior to or at the time of the entry of the order judgment of the District Court on November 16, 1962 (R. 181-182).* It is elemental that a Federal District Court has no jurisdiction of any proceeding unless same is or does constitute a case or controversy under Article III, Section 2, of the Constitution of the United States. When this case in the District Court reached

the point in the proceedings *where Lewis could not defend herself against the charges made against her*, could not challenge or contest the legal sufficiency or the factual existence or foundation of or for the reasons alleged by Respondent as entitling him to an order judgment of the District Court, then it is clear that this original case then and there ceased to be a case or controversy; and the District Court should have dismissed same rather than granting a judgment order against defendant. Strangely enough, this point was reached in the case in the District Court as per the holding in *Kennedy vs. Lynd*, 306 F. 2d 222, 226, when Lewis admitted in her answer only that she was the Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi — that she had the possession and control of the documents involved — that petitioner's predecessor had requested her permission to inspect and reproduce said documents and that she had denied same — and when as the Record shows she had reasonable notice of the pendency of the filing of this case.

From that point on out to date: Lewis was not permitted to prove the denials in her answer of Respondent's conclusionary allegations in his complaint upon which he predicated his claim to a judgment order of the District Court; she was not permitted to defend herself against such factual charges; her motions to dismiss challenging the legal sufficiency of said conclusionary allegations were never considered upon their merits. Thus, there no longer existed in the District Court any controversy, any dispute, any adversary proceeding. Thus, no jurisdiction in the District Court under said Article III, Section 2, of the Constitution of the United States. This point was mentioned and brought up to the District Court (R. 156). It was

mentioned in the brief filed by Lewis in the Fifth Circuit. This Court and both below notice their own jurisdiction sua sponte; but the Courts below were not left to that. If this Court should find that no jurisdiction existed in the District Court to have issued the judgment order (R. 181-182), it may in the exercise of its supervisory powers either dismiss the cause or remand it with directions to the District Court to pick up where it left off and let Lewis have that which she is entitled to — the exercise of the right to defend herself against the charges made against her.

The following is a statement of the facts shown by the Record which are material to the consideration of the questions presented.

Throughout the pleadings, the statements of counsel and the Court in the District Court reference was made to the sections of Title III of the 1968 Civil Rights Act under which the proceedings were begun which culminated in the District Court and which was begun as an adversary proceeding, a case or controversy. In view of this and for the convenience of the Court, we *correlate the five sections of said Title III with the corresponding section of the compilation thereof, Title 42, USC, 1974, 1974a-e.* Hereafter, we will principally refer to the section of the compliation, thus substituting it for the corresponding section of said Title III as used in the Record. Each section of said Title III will be designated on the lefthand side of this page, and the corresponding section of the compilation, Title 42, USC, will be placed opposite it, thusly:

Section 301 is 1974;
Section 302 is 1974a;
Section 303 is 1974b;

Section 304 is 1974c;
Section 305 is 1974d;
Section 306 is 1974e.

On August 11, 1960, Rogers, the then Attorney General of the United States, made a written request under 1974b upon petitioner, the Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi, for permission to inspect and reproduce all records therein described (R. 4,5) which were in her custody, possession or control, and stated therein (R. 5) the reasons why he asked such permission and the purpose to which he would put it (R. 5, par. 1 & 2).

Lewis refused this request (R. 8).

On January 11, 1961, said Rogers filed his unsworn complaint (improperly designated an application) (never supported by any affidavits), in the District Court below in this case, an adversary proceeding, a case or controversy, under the provisions of 1974d against Lewis, said Circuit Clerk and Registrar, requesting an order of the District Court commanding Lewis to perform the affirmative act of making said records available to him for the purpose of inspection and reproduction; Rogers alleged that the records were in Lewis' possession, custody and control and that he had made the above request, which Lewis had refused; he made the said written request Exhibit "A" to his complaint, a part thereof; and thereby conclusionarily alleged in the complaint the reasons why he made the request and which he said entitled him to the aforesaid order from the District Court; he also stated the purpose to which he would put the said records and information therefrom secured (R. 1-5, R. 2, Par. IV, R. 5, par. 1 & 2). Lewis was made the sole defendant in the case; notice

was served upon Lewis that the complaint would be submitted to the District Court twenty-two days thereafter; on January 21, 1961, Kennedy assumed the office of U. S. Attorney General and pursuant to his motion so to be, the Court entered an order on July 7, 1961 (R. 53-54) substituting him as plaintiff in the place of Rogers; timely, and within the period allowed by the Court, defendant, Lewis, filed various motions challenging the constitutionality of all sections of said Title III, compiled as aforesaid, together with her motion to dismiss the complaint for failure of the complaint to state a claim upon which relief could be granted (R. 64-65). After various proceedings, unimportant here, and with said motions pending and within the period allowed by order of the Court, Lewis filed her answer (R. 141-148); it admitted some portions of the complaint and denied other portions thereof — Lewis admitted that she was Circuit Clerk and Registrar of Bolivar County, Mississippi, and had continuously so been since January, 1952; admitted that on August 11, 1960, the aforesaid written request dated August 5, 1961 (R. 4 & 5) had been made of her for permission to inspect and reproduce said documents and that she had refused same.

At this point, respondent's allegations in the complaint, of the reasons why he made the request of Lewis to inspect and reproduce said documents, together with Lewis' denials thereof, and respondent's statement of the purpose of his seeking the information contained in said records, becomes the controlling factors in this case; for the convenience of the Court, we quote first the reasons alleged by respondent (R. 2, par. IV, par. 2) and then Lewis' denials thereof:

"* * * information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction."

Lewis' denials thereof in her answer (R. 142-143) are thus:

"Accepting the said letter, which purports to be a demand according to its terms, dated August 5, 1960, as a part of the complaint of application herein filed against her, defendant or respondent says that she is without knowledge or information sufficient to form a belief as to the truth of the allegations in said Exhibit "A" that the demand is based upon information in the possession of the (then) Attorney General tending to show that distinctions or discriminations on the basis of race or color have been made with respect to registration and voting within defendant's jurisdiction and, therefore, defendant denies same.

"Defendant or respondent believes that on August 5, 1960, the date of said alleged demands, and on August 11, 1960, the date of the delivery of said alleged demand to this defendant, and on January 11, 1961, the date of the filing of the Application or Complaint against the defendant, *the then Attorney General of the United States, did not have information, or reasonable information, upon which a reasonable conclusion could be drawn or based that she*, this defendant, had made distinctions or committed discriminations on the basis of race or color with respect to registration and voting within Bolivar County, Mississippi; and, therefore, believing same, she must, in the discharge of her official duty as she conceives it to be, *deny and*

does hereby deny that the said Attorney General of the United States had such information, and, therefore, so denies that on said date or dates any basis existed for the making of the said alleged demand upon her." (Emphasis added).

Respondent's statement of the purpose of the request (R. 5, par. 2) is as follows:

"The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred." *Lewis' denial of said allegations of purpose* (R. 143) is thus:

"Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 3 of the said alleged letter of demand made Exhibit "A" to the Complaint or Application and made a part thereof, to the effect that: 'The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred', and, *therefore, defendant denies same.*" (Emphasis added)

On August 21, 1962, pursuant to proper notice from the Court, counsel for the parties-plaintiff and defendant and *the defendant herself assembled at Oxford, Mississippi, ostensibly* or *purportedly* for *the purpose of having a hearing or trial on the merits of this case;* but, as the Record shows, (R. 149-182) *THERE WAS IN FACT NO TRIAL ON THE MERITS AND, NO HEARING ON THE MERITS WITHIN JUDICIAL CONTEMPLATION OF THAT TERM WHEN USED IN CONNECTION WITH A CASE OR CONTRO-*

VERSY. What happened upon said assemblage: (R. 149-182)

Both parties announced ready — respondent's counsel contended he was entitled to the judgment order as prayed for *requiring Lewis to commit the affirmative act to produce said documents* — he said this based and predicated upon *Kennedy vs. Lynd* issued by the Fifth Circuit, 306 F. 2d 818, 822, because it held there were only two items subject to litigation *in this so-called* case or controversy which were (1) whether the request or demand had been served upon Lewis and (2) whether the records referred to were in her possession or control — counsel for defendant asked the Court to inquire whether plaintiff had proof to offer or was the defendant to understand that plaintiff would offer no proof — the Court stated that the plaintiff had rested his case — he had no proof to offer and, in substance, stood as if plaintiff made a motion for judgment on the pleadings — counsel for Lewis stated that in that state of the case, "* * Defendant *without waiving her right to put on proof* asks that this Court enter a decree for the Defendant * * *"; and then proceeded in the subsequent portions of the Record to assert why she was entitled to a decree in her favor dismissing the complaint — among other things, petitioner made it clear that Lewis had made the aforesaid denials of the aforesaid allegations of plaintiff's complaint, respondent here; *among the reasons* urged by defendant were said denial — that Lewis was entitled to defend against the charges made against her — as a defendant in a case or controversy — that this was not an ex parte proceeding — that there were differences and distinctions between the Lynd and Lewis cases — asserted that if Lewis couldn't defend herself, *then there was*

no case or controversy and the Court was deprived of jurisdiction or there existed a denial of due process — that the complaint stated no claim upon which relief could be granted against Lewis'; and that not only the wording of the Statute, but also the legislative history of 1974d gave Lewis the right to defend herself in every particular, and required plaintiff to prove his case — that any order issued by the Court without conducting the hearing as a case or controversy would constitute an invalid and arbitrary order judgment and would deny defendant due process of law — that there could be no case or controversy if there were no disputes and no actual controversies upon the decisive allegations of the complaint — defendant made other assertions and grounds for her right to defend herself — counsel for Respondent said that Lynd had decided everything and that neither the legal sufficiency of nor the factual existence or factual foundation for the reasons asserted by respondent could be questioned or disproved or litigated (R. 149-176); the Court pointed out the confused state of the decisional law in the Fifth Circuit by saying (R. 175) that through Bruce, the Fifth Circuit had held that a proceeding such as in Lynd was not a case or controversy and then, in Lynd, they said it was — the Court said that what Lynd holds is that the Attorney General of the U. S. was entitled to make a conclusive, final, non-litigable, non-controversial, *ex parte determination of* the sufficiency of his own reasons for the Court issuing the order — that it appeared the Court was bound thereby; the Court (R. 177, et seq.) asserted that he considered the matter a case or controversy from the inception — that Lewis was entitled to due process but that he felt bound by the decision of the Fifth Circuit — that he didn't agree with the Fifth

Circuit; but that he would consider all features and render a decision shortly and offered both parties an opportunity to submit any memoranda on the points of due process and whether the United States, as a Sovereign, could cast duties and obligations upon an officer of another without the consent of that sovereign; Lewis argued to the court all of her motions to dismiss. *The defendant, Lewis, was present in open court, ready to testify in opposition to any testimony adduced by respondent and to prove and support her denials and assertions in her answer.*

Lewis having protected, in every way, her right to put on proof to support her denials of the aforesaid allegations in the complaint, still has this right if, as and when she is given an opportunity to have a judicial hearing and determination upon the issues of fact made by her answer and her several motions to dismiss. For this Court to pass upon the merits of said motions before the District Court would be premature and the exercise of original jurisdiction.

On November 16, the Court feeling that he was bound upon all questions by the said case of *Kennedy vs. Lund*, supra, issued his "automatic" order judgment, upon "Secret Evidence" (R. 181-182) commanding Lewis to perform, in part, the affirmative act sought by Respondent; and purported to overrule all motions filed on behalf of Lewis. It is apparent, however, that as he followed Lynd, he merely overruled them because that case prevented him from determining the legal sufficiency of respondent's allegations and not because of any lack of merit in the motions.

The above order is silent on whether or not it overruled or sustained Lewis' *motion for a decree, supra,*

but we assume that it so did — if not, it is left undetermined by the District Court; the order, on its face, clearly shows that no evidence of any kind was offered or introduced by either party.

But here lies one of the quirks of this case. If no evidence was adducible upon respondent's complaint, then Lewis' admissions in her answer could not be considered as evidence and should not be any part or parcel of an order granting respondent's order judgment — if this is not true, then there is a further deprivation of Lewis' rights and due process of law because this would amount to Respondent being entitled to adduce proof and *Lewis being denied that right.*

Both parties feeling aggrieved by the said order appealed. The Fifth Circuit issued the opinion and entered the judgment reflected by this petition for certiorari (A13 & A16).

REASONS FOR THE ISSUANCE OF THE WRIT

As shall appear from the following argument, this writ should be issued for the following reasons: (1) The decision of the Fifth Circuit Court of Appeals in this case is in conflict with the decisions of other Courts of Appeal on several questions which go the heart of the case at bar, including the point that the cases of *Kennedy v. Ezzell* and *Kennedy v. Owen*, supra, are here held to be the basis and foundation of the opinion and judgment here sought to be reviewed and those two cases are in conflict with decisions of other Courts of Appeal under similar circumstances; (2) The Fifth Circuit Court of Appeals in this case has decided important questions of Federal law which have not been but should be settled by this Court; this Supreme Court has never passed upon or determined the true meaning and effect

of Title 42 U.S.C.A. 1974d and the rights of the respective parties to a case filed thereunder; and has never decided any case upon or settled the many questions involved in said 1974d or the remainder of Title III compiled as Section 1974, 1974a-e of Title 42 U.S.C.A.; and (3) the Fifth Circuit Court of Appeals has in this cause decided Federal questions in a way in serious conflict with applicable decisions of this Court, including the due process of law provision of Amendment V to the Constitution of the United States; and has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

As apparent from the questions presented herein at pages 7-9 hereof, they are so entwined and interwoven together and the reasoning and argument in one flows over into the other to such an extent that clarity and brevity will be promoted by addressing our total argument to all of the questions presented without trying to argue each question as a separate and distinct point. However, whenever possible, we will subdivide this argument into appropriately designed portions.

This case and those upon which it is specifically predicated announce rules which vitiate and tend to destroy the very foundation of our government and the judicial processes of our Federal and State Courts. The Courts below announce a rule of statutory construction which permits and glorifies "secret evidence" and "secret charges" as the basis of judicial action. This is violently contrary to the condemnation which this and other Courts have expressed upon "secret evidence" and "secret charges", "no day in court" and "no due process".

The Courts below, but the District Court by mandate of the Fifth Circuit, have said by their decisions herein that governmental action may be predicated upon secret, arbitrary and an unlitigatable determination or adjudication by Respondent that the judiciary must sustain that Executive determination or finding even though the Court does not know and cannot learn or determine the facts which constitute the basis thereof.

"Woe is the day" when the judiciary abdicates and the unbridled Executive Department becomes the accuser, the Judge and the jury — undressed of its slogan and catchy phrase of the "right to vote", the foregoing abdication is what is sought here. *Permit this "take over"* by the Executive and the next and *more extensive conquest will be* easier and with precedent.

The Courts below have announced a rule of statutory construction that even though a Federal statute — the same would apply to a State statute — which clearly authorizes a Court to determine the judicial rights of parties litigant may be rewritten and construed directly contrary to said terms of that statute; and this even when the legislative history of that statute is clear in giving a party defendant before the Court a right as a party defendant to defend herself against the charges made against her.

A. *BY THE PROVISIONS OF SAID SECTION 1974d, LEWIS COULD LITIGATE AND THE DISTRICT COURT IS VESTED WITH THE POWER AND AUTHORITY TO DECIDE ALL ISSUES OF FACT AND DETERMINE ALL QUESTIONS OF LAW CONCERNING WHETHER AN ORDER TO PRODUCE SHALL BE ISSUED; SUCH SUSTAINS LEWIS' CONTENTIONS.*

Petitioner asserts unequivocably that the true meaning of the terms of said Section 1974d and as also shown by the authoritative Legislative history thereof is that she may litigate in the District Court both the legal sufficiency of and the factual existence and foundation for the reasons alleged by Respondent as entitling him to the judgment order of the District Court.

The House Judiciary Committee statement of the meaning of Section 1974d which was presented to Congress and upon which it acted is thus:

> "* * * that in the event of nonproduction, jurisdiction would be conferred upon the Federal district courts to resolve any dispute which might arise in connection with the exercise of the authority conferred upon the Attorney General by this title including appropriate process to compel the production of the record or paper."

Lewis says this Section [redacted]:

> "It does not contain any restriction or exception upon or to the court or judicial proceeding provided for thereby. We say this in spite of Lewis, *Kennedy v. Lynd* and *Owen*, supra. If there is an exception, where is it? There is no prohibition therein against the application of the Federal Rules of Civil Procedure to this proceeding. The Federal Rules of Civil Procedure have the force and effect of statutes — they apply to this proceeding fully, wholly and completely. See *Federal Rules of Civil Procedure*, Rule 1, and *Annotations* under Note 24, *U. S. C. A.*, and Rule 81a(3). There is nothing in this Section which purports to amend or repeal any Federal Rule of Civil Procedure. There is nothing to indicate that the Attorney General is exempted or relieved of any obligation that otherwise exists upon any

complaining party litigant in a Federal District Court. There is no indication that any "automatic order" will, would or could issue under this Section. There is no restriction which prohibits the District Court from determining the factual foundation for, if any, or the legal sufficiency of the reasons alleged by the U. S. Attorney General in his complaint, filed under this Section wherein he requests a court order to compel production of the documents and there is nothing to indicate that the court cannot exercise its judicial powers of review or ascertainment of such factual foundation or sufficiency of said allegations in said complaint. [redacted] There is nothing in this statute upon which any claim to any order based on "secret evidence" — can be sustained — secret evidence kept from the court — not known to it and not ascertainable by it and, likewise, as to Lewis. There is nothing in this Section which would indicate or suggest or even permit an "ex parte" proceeding to be had. There is no duty existing on any registrar to grant the request or demand of the U. S. Attorney General to inspect, copy, etc. said documents upon which any predicate for an ex parte order could be issued as such request or demand creates no duty on the registrar to accede thereto. The U. S. Attorney General did not seek and is not given the subpoena power. The language of this section opens "wide the doors" for the full exercise by the Court of all of its powers under all of the law for the Court, in the exercise of its judicial powers, to determine whether or not an order to compel production shall not or shall issue.

What else do we readily find dealing with the meaning of §1974d, which would indicate whether there is or is not any restriction as contended for by Kennedy and as found by the Court in Lewis, *Kennedy v. Lynd* and *Owen? We find no evidence that any restriction exists.* In fact, *all of the evidence supports Lewis' contention in the District Court and in this Court that there is no restriction on such proceeding.*

When we turn to the U. S. House and Senate hearings in 1959 on the preservation of voter records bill which is now said §1974d, we find that Rogers, the then Attorney General of the United States, himself, gives us testimony that *absolutely supports Lewis* in her contentions and *totally contradicts the claims of Kennedy and the holding of the Court in Lewis, Kennedy v. Lynd and Owen*, supra. Does he say the Court cannot resolve *any dispute?* Does he say the hearing and proceedings before the District Court are restricted in any way? His answer to both questions is *NO.*

The wording of the provision that Rogers was talking about in both hearings now to be mentioned were exactly the same as those contained in the finally enacted §1974d. At page 211 of the House of Representatives Hearings before subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 86th Cong., 1st Sess., when testifying on March 11, 1959, Rogers said:

> "In the event of non-production, jurisdiction would be conferred upon the Federal district courts to resolve *any dispute* which might arise in connection with the exercise of the authority conferred." (Emphasis added).

U. S. Attorney General Rogers also testified before the U. S. Senate subcommittee on Constitutional rights

of the committee on the Judiciary, 86th Cong., 1st Sess., on Friday, March 20, 1959, and he said (P. 191, Par. 3) the same thing on the same provisions:

> "In the event of non-production, jurisdiction would be conferred upon the Federal district courts to resolve any dispute which might arise in connection with the exercise of the authority conferred."

At page 192 of the Senate hearing, supra, and at page 212 of the said House hearing, he gave the following reasons why the U. S. Attorney General did not ask for and should not have the "subpoena power" in regard to the records referred to in said Title III, § § 1974, 1974a-c. In the Senate hearing he said thus:

> "The subpoena power might be viewed by some as an attempt by the Federal Government to interfere with State control over voting records."

In the House hearings, he said thus:

> "In other words, we thought the subpoena power might be construed as an interference with the State's power over voting, and we wanted to limit it merely to the right of inspection so we wouldn't be accused of requiring the people to produce the records in Washington or somewhere else."

We have these hearings before us and we assert unequivocally that at no time under any circumstances did the Attorney General or the Department of Justice or anyone else in the position to make an authoritative statement contend that there was any restriction of any kind upon the court proceedings under said § 1974d, 1974a-c, which would justify the holding of this Court in *Lewis*, *Kennedy v. Lynd* and *Owen*.

We submit that there is no legislative history or statutory language authority anywhere which says that in a § 1974d, § 305, proceeding the U. S. Attorney General does not have to allege and prove, as in a regular court proceeding and subject to the Federal Rules of Civil Procedure, that there are reasonable grounds to believe and that he does believe that discriminations because of race, color or previous condition of servitude are being made, at the time of the request to inspect the documents, or when the § 1974d suit was filed in the District Court against voters in the county of the registrar of whom the request is made; thus the Attorney General of the U. S. must allege and prove, in said § 1974d, proceedings, that he has reasonable grounds to believe and does believe persons *otherwise qualified by law* are being subjected by the registrar to distinctions because of race in voting in that county. We think it is not too much for the Attorney General of the United States to be subjected to these requirements — if he does not believe the information he has, he should not seek the records.

At this point, it is significant to mention that *no one has ever asserted and no court has held that the request of the U. S. Attorney General* for *permission* to inspect and copy *records creates any* duty of any kind, under any circumstances upon Lewis, or any registrar, to comply therewith. The U. S. Attorney General does not have the subpoena power. Thus, there being no duty upon the registrar to comply with the request or demand, we then have the inevitable result that the filing of the complaint or application of the Attorney General under said § 1974d, § 305, is an original suit or the beginning of a controversy in the process of which "disputes" are contemplated to be presented to and decided by the Court.

It has never been contended by any of the above persons or officials that a § 1974d. proceeding is ancillary to anything. Even *Kennedy v. Lynd*, 306 F. 2d 222, page 227, last two lines on lefthand column, recognized it as an absolutely independent and distinct proceeding from any suit brought by the Attorney General under § 1971, Title 42, *U. S. C. A.*

The record on the trial of the case of *Crum Dinkins v. The Attorney General of the United States* in the District Court of Alabama, 187 F. Supp. 848, the opinion being adopted by the Fifth Circuit in 285 F. 2d 430, *Crum Dinkins, et al. v. Rogers, Atty Gen.*, shows that during the course of the trial in the District Court, Harold Greene, who was prosecuting the case under § 1974d, on behalf of Rogers the then Attorney General, and who was on the *brief in the Fifth Circuit* in Lewis— he [redacted] the argument for Kennedy in the Fifth Circuit in Lewis — stated his understanding and that of the Department of Justice upon the meaning and Legislative history of § 1974d and the power of the court thereunder. Said 1974d became effective May 6, 1960 and on July 13, 1960, 37 days thereafter Mr. Greene, solemnly speaking to the District Judge in advocacy of Rogers' position in that case, said at page 90 of the printed record in the Fifth Circuit:

"As we read the *Civil Rights Act of 1960*, and *as we read the legislative history of that Act*, it was the intention of the Congress *that all controversies arising under Title III, the records demand*, should be litigated and adjudicated *within the framework of* Section 305, in which if gives the District Court of the United States *the power to determine whether or not a demand for records should be enforced*. We have cited the testimony of the Attorney General to that effect, who

was the — who submitted this particular proposal to the Congress." (Emphasis added).

What could be more conclusive than that statement — what could be entitled to more weight? The *intent* of Congress could not have changed. The wording of the statute has not changed. Greene treats "controversies" as synonymous with "disputes".

In view of the foregoing, how can the words "all disputes" and the words "all controversies" be translated or turned into anything less than "*all*"? This excludes any exceptions.

What danger, if any, is implicitly inherent in Kennedy v. Lynd, Owen, *and the opinion of this Court in Lewis rendered December 6, 1963?* There is clear and present danger — there is permanent danger — how and why?

The answer is that if a statute so clear, definite and certain as said § 1974d, and the entire Title III and the Legislative history thereof, including solemn statements before House and Senate committees and in court, are not to be accepted, then the question arises, why not? In other suits in other fields, *Kennedy v. Lynd, Owen* and *Lewis could be well cited* to sustain the proposition that the *definite meaning of a statute, clear as to that meaning, whose Legislative history is clear as to that definite and certain meaning, could be by this Court construed to mean something completely and totally different.* This, we submit, is a dangerous course to follow and one which does not comport with established proceedings and administration of justice in the Federal courts.

The words of § 1974d, "appropriate process" are most significant on this point of restriction or exclusion. Under § 1974d, who is to determine what is appropriate

process — Of course, the Court alone is to determine that and also it is the sole determinator of whether any order or process shall issue or shall not issue, *U. S. v. Wood* 295 F(2) 772, 779. "Appropriate process" means, of course, process, if any, to which the District Court finds the complaining party — Kennedy here — is entitled under the law, the facts and pleadings — such also is the rule as to an appropriate judgment. The Court is also the sole entity to determine whether any process should or should not issue. *Smith vs. Whitmore*, 276 F. 2d. 741, 745.

Said Judiciary Committee says this § 1974d, § 305, means or provides:

> "That in the event of nonproduction, jurisdiction would be conferred upon the Federal District courts to resolve *any dispute* which might arise in connection with the exercise of the authority conferred upon the Attorney General by this title including appropriate process to compel the production of the record or paper." (Emphasis added).

In the 1960 hearing before the full Senate Judiciary Committee Deputy Attorney General Walsh said the Federal Rules of Civil procedure would apply to a 1974d court proceeding. Before the full Senate Judiciary Committee in a hearing held on *March 28, 1960*, U. S. Attorney General Rogers, through Deputy Attorney General Walsh (p. 9, par. 8) (Rogers p. 1 having laryngitis), said that 1974d means exactly the same thing as stated by the House Judiciary Committee, supra.

Congressman Cellar, Chairman of the House of Representatives Judiciary Committee, on March 10, 1960 said on the floor of Congress in 1960, advocating the adoption of Title III of H. R. 8601, Cong. Record 1960, Vol. 106, p. 5200, Bound Edition that § 1974d means

exactly the same thing as written by the House Judiciary Committee — and also quoted its stand on all other provisions.

That no duty is created upon Lewis or any registrar by the mere circumstance of Rogers or Kennedy requesting or demanding her permission to inspect, copy and reproduce the records is so stated in Rogers' brief filed in the District Court in *Crum Dinkins*, supra, 187 F. Supp. 848, opinion adopted by Fifth Circuit, 285 F. 2d 430; by virtue of the adoption, the statement in the brief is, we think, equivalent to making such a statement in or before the Fifth Circuit. The statement referred to is found on page 8 of Rogers' Memorandum of Law in the District Court served on Crum Dinkins, et al, Registrars, on July 8, 1960 — quoting from the brief, prepared, we assume, by Mr. Greene, then and now of the Department of Justice, we find:

> "On the other hand, a demand for records for the Attorney General pursuant to Section 303 of the 1960 Act, (he is referring to what is and was S. 1974b in the above compilation) does not create a justiciable controversy, for it alone is insufficient to obligate those upon whom the demand is made to do any act. An enforcement order by District Court pursuant to Section 305 is necessary before a duty to comply with the Attorney General's demand arises."

In the event Respondent denies any of the assertions above made, then in our reply to any opposition which he may file hereto, we will quote the documents referred to which are not otherwise quoted in the Appendix hereto.

Whenever any Court proceeding is created by statute and as here Kennedy, Petitioner, is given the authority

to institute suit against Lewis, she is thereby inherently vested with the right to make full defense against all charges asserted against her. If the rule were otherwise, then the statute itself would be violative of substantive and procedural due process and unconstitutional.

B. *SECRET EVIDENCE CANNOT CONSTITUTE THE BASIS OF JUDICIAL ACTION; THE DECISIONS OF THE COURTS BELOW DEPRIVED LEWIS NOT ONLY OF HER INHERENT RIGHT AS A DEFENDANT, BUT ALSO HER LIBERTY UNDER DUE PROCESS OF LAW PROVISION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; IN A CASE OR CONTROVERSY LEWIS CAN LITIGATE ALL POINTS BOTH LAW AND FACT; IF NO CASE OR CONTROVERSY, NO JURISDICTION EXISTS IN THE DISTRICT COURT OR THE FIFTH CIRCUIT.*

Secret evidence has been consistently condemned by the Supreme Court of the United States and the Fifth Circuit in the following cases: *Dixon v. Alabama State Board of Education*, 5 Cir., 294 F. 2d. 150, Cert. Den. 368 U.S. 930 (1961); *Greene v. McElroy*, 360 U.S. 374 (1960); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 163, 95 L. Ed. 817.

Among the rights denied Lewis by the proceedings below is her freedom from restraint or freedom from control by an order of the Courts below made without her having the rights of a def. to defend herself against the charges and when she was denied due process of law in protecting herself against such deprivation. The deprivation is that she is commanded to do or perform

an act which otherwise she would not be required to do. Such a deprivation is not to be permitted under the circumstances in this case. *Kent v. Dulles*, 357 U.S. 116, 2 L. Ed. 2d. 1204, 1210.

The proceedings below clearly deprive Lewis of both substantativ and procedural due process. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 6 L. Ed. 2d. 1230 (1961); see also dissent by Justices Brennan, Chief Justice Warren, Justices Black and Douglas, wherein, at page 1239, they say:

> "Such a result and effect nullifies the substantive right — not to be arbitrarily injured by government — which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection . . . the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principal basic to our society." (Citing cases, including Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S. 123, 168, 95 L. Ed. 817).

Secret evidence has recently been condemned in the Fifth Circuit in the case of U. S. v. Atkins, 323 Fed. 2d. 733, which held that no applicant for registration could be denied registration upon a lack of good moral character without having an opportunity to defend against and be heard upon the question of his character.

To hold Kennedy's (originally Rogers') statement of the basis and purpose of the demand (R. 4 & 5) as conclusive in the face of a denial by Lewis that he had, in fact, such basis and purpose constitutes an invalid and unconstitutional legislative adjudication of an ultimate evidentiary fact which is thoroughly beyond the

competence of Congress under the Constitution. *This would constitute an invalid legislative determination that Lewis was guilty, or that the Respondeat had reasonable grounds to believe Lewis was guilty of felonies and misdemeanors under both Federal and State law.* (A. 5, 6 & 7). *Such a conclusive presumption stultifies the judicial process* and is contrary to the basic principles of "fair play" and "even-handed justice" which is demanded by the due process clause of the Fifth Amendment. Of course, this needs no citation of authority.

If the Courts below and in Lynd and Owen, supra, so hold in their construction of said 1974d it is violative of said due process clause; if, in fact 1974d means that Kennedy's statement of the reasons alleged entitled him to an automatic judgment order is in complaint or application conclusive and cannot be litigated in the District Court by Lewis with "all of the weapons" afforded by the due process clause and the Federal Rules of Federal Procedure just like any other case, then this Court shall have construed or enforced a construction of said Title III which is violative of due process and such enforced construction is invalid as comparable to that condemned by the Supreme Court in the case of *Shelley vs. Kraemer, 334* U. S. *1, 92* L. Ed. *1161.* The rule of Shelley, supra, is equally applicable to the judiciary department of the United States.

There is nothing in Title III, as we read it, which prevents Lewis or any other Registrar in her position from having and exercising her "due process" rights and privileges.

Unless Lewis is correct in her contentions in this case, the District Court of the United States and this

Court will be but a mere "rubber stamp" for an invalid enactment of Congress violative of the said due process clause.

When Lewis was decided by the District Court on November 16, 1962, the decisions of this Court were in irreconcilable conflict if Bruce, supra, meant what is ordinarily understood would be conveyed by the language that a 1974d proceeding was not a suit of any kind. A suit is synonymous with case under said Article III, Section 2.

In other portions of this argument we demonstrated that *Kennedy vs. Lund*, supra, does not constitute a valid holding of this Court upon any part or parcel of 1974d because, among other things, to so interpret it would violate the rule of Thomas, supra. Hudson v. Newell from the 5th Circuit; Sinor, other Circuits and this Court, infra.

See the following three cases from the Fifth Circuit and the others from other Circuits:

Hudson vs. Newell, 172 F. 2d 848 (1949); *U. S. vs. Sinor*, 238 F. 2d 271; *Thomas vs. Thomas*, 165 F. 2d 332 (1945).

The cases from this Court and other Circuits clearly support the rule that a Circuit Court of Appeals cannot properly exercise anything but Appellate jurisdiction in this case; cannot and should not decide or pass upon matters not judicially determined or decided by a District Court: Eighth Circuit, *Holliday vs. Great Atlantic & Pacific Tea Co.*, 256 F. 2d 297; *O'Malley vs. Cover*, 221 F. 2d 156; Second Circuit, *Dictagraph Products vs. Snontone Corp.*, 231 F. 2d 867. Cases from every Circuit

and this Court could be cited to sustain this point but the foregoing should be sufficient.

If it be held, that a District court is to blindly issue its process to enforce a request of an executive officer which creates no duty by the requestee to comply therewith, without the right of exercising its power of judicial inquiry, which is concomitant to the exercise of the judicial power, then Federal jurisdiction of this cause would be destroyed, in that the jurisdiction of the United States Courts is confined by Article III, Section 2, of the Constitution of the United States to "cases or controversies."

We submit that the only proper function of the United States District Court in these proceedings is to *adjudicate* the rights of parties litigant, and that once the Attorney General decided to avail himself of the processes of that Court, when he had no other way to secure access to the documents that the duty and power of adjudicating the rights of the parties based on *findings* as to all material issues in dispute, devolved upon that Court. In short, the only proper function of the District Court in these cases is to adjudicate, not investigate or become an adjunct to an investigative process without first exercising its powers of judicial inquiry into all material disputed issues.

In *Tutun vs. United States*, 270 U. S. 568, 576, 70 L. Ed. 738, 741, the United States Supreme Court dealt with the question of whether a naturalization proceeding constituted a "case or controversy" within the meaning of Article III, Section 2, of the Constitution. In deciding this case, the Supreme Court used the following pertinent language in stating some of the necessary elements of a "case or controversy":

"If the proceeding were not a case or controversy within the meaning of art. 3, Sec. 2, this delegation of power upon the courts would have been invalid.

* * * * * * * * * * * *

"Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself, and provide only an administrative remedy. United States v. Babcock, 250 U. S. 328, 331, 63 L. Ed. 1011, 1012, 39 S. Ct. Rep. 464. It may provide a legal remedy, but make resort to the course available only after all administrative remedies have been exhausted. Compare New Orleans v. Paine, 147 U. S. 261, 37 L. Ed. 162, 13 S. Ct. Rep. 303; United States v. Sing Tuck, 194 U. S. 161, 48 L. Ed. 917, 24 S. Ct. Rep. 621; American Steel Foundries v. Robertson, 262 U. S. 209, 67 L. Ed. 953, 43 S. Ct. Rep. 541. It may give to the individual the option of either an administrative or a legal remedy. Compare Clyde v. United States, 13 Wall. 38, 20 L. Ed. 479; Chorpening v. United States, 94 U. S. 397, 399, 24 L. Ed. 126, 127. Or it may provide only a legal remedy. Compare Turner v. United States, 248 U. S. 354, 62 L. Ed. 291, 39 S. Ct. Rep. 109. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." (270 U. S. 576, 577, 70 L. Ed. 741, 742)

And, in the landmark case of *Muskrat vs. United States*, 219 U. S. 346, 356, 55 L. Ed. 246, 250, the Supreme

Court of the United States, in discussing what constitutes a "case or controversy" stated the rule as follows:

> "It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power' said Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller, Const. 314.
>
> * * * * * * * * * * * *
>
> "What, then does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'. A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison, 1 Cranch. 137, 2 L. Ed. 60, to be a suit instituted according to the regular course of judicial procedure." (219 U. S. 356, 55 L. Ed. 250)

A holding that the District Courts do not have the power and authority to judicially inquire into all material issues and disputes presented in Sec. 305, Title III proceedings does not square with the language above quoted from the Tutun and Muskrat cases, supra, which defines the judicial power of the courts of the United States, and also defines what constitutes a "case or controversy".

Unless the "nature of the proceeding which Congress has provided for securing the grant" (Tutun v. United States, supra, 270 U. S. 576, 70 L. Ed. 741) includes and encompasses the duty and power of the courts of the United States to exercise their power of judicial inquiry into every material issue in dispute, then the proceeding

is outside the scope of the judicial power of the courts of the United States as defined and delimited by Article III, Section 2 of the Constitution and the cases interpreting that Section. If the courts of the United States must blindly issue its process in aid of an administrative proceeding, then the nature of the proceeding is not judicial, but is administrative, and, it is elementral that courts of the United States cannot be constitutionally delegated any administrative powers or functions. See *Tutun v. United States*, supra; *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 74 L. Ed. 969; *Porter v. Investors Syndicate*, 286 U. S. 461, 76 L. Ed. 1226; and *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598.

What is "a remedy enforceable in the courts according to the regular course of legal procedure"? (Tutun v. United States, supra, 270 U. S. 577, 70 L. Ed. 741). It is more certainly *not* a case such as the one at hand, in which after issue has been joined by way of responsive pleading on a material point, the moving party, who has the burden of making out a case, declines, after being afforded an opportunity, to put on any evidence or proof as to the controverted issue, and then is granted relief. Unless a suit is brought and prosecuted in the regular course of legal procedure, there is no case within the meaning of the Constitution, and thus, no Federal jurisdiction.

The mere fact that there are adverse parties to the action is not enough to constitute a "case or controversy" unless the other essential elements of a "case or controversy" as above discussed, are also present.

In defining what constitutes due process of law under this Amendment, we have found no more succinct summary than that of Justice Frankfurter, in his concurring

opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 161-172, 175, 95 L. Ed. 817, 848-854, 855, 71 S. Ct. 624. Because of the clarity, brevity and thoroughness of this resume', we quote at length therefrom:

"Fairness of procedure is 'due process in the primary sense.' Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 681, 50 S. Ct. 451, 454, 74 L. Ed. 1107. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. '(T)his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard . . .' The Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S. 86, 100-101, 23 S. Ct. 611, 614, 47 L. Ed. 721. "(B)y "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.' Hagar v. Reclamation District, No. 108, 111 U. S. 701, 708, 4 S. Ct. 663, 667, 28 L. Ed. 569: 'Before its property

can be taken under the edict of an administrative officer, the appellant is entitled to a fair hearing upon the fundamental facts.' Southern R. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U. S. 190, 199, 54 S. Ct. 148, 151, 78 L. Ed. 260. 'Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.' Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 281 U. S. at page 682, 50 S. Ct. at page 454.

"The requirements of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

"Fully aware of the enormous powers thus given to the judiciary and especially to its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent-in judges not subject to the fears or allurements of a limited tenure and, by the very nature of their function detached from passing and partisan influences.

"It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. Compare, for instance, Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 15 L. Ed. 372, with Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938, and see Federal Communications Comm. v. WJR, 337 U. S. 265, 275, 69 S. Ct. 1097, 1103, 93 L. Ed. 1353. Whether the ex parte procedure to which the petitioners were subjected duly observed 'the rudiments of fair play,' Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 168, 34 S. Ct. 301, 58 L. Ed. 554, cannot, therefore, be tested by more generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the judicial judgment.

"Applying them to the immediate situation, we note that publicly designating an organization as within the prescribed categories of the Loyalty Order does not directly deprive anyone of liberty or property. Weight must also be given to the fact that such designation is not made by a minor official but by the highest law officer of the Government. Again, it is fair to emphasize that the individual's interest is here to be weighed against a claim of the greatest of all public interests, that of national security. In striking the balance the relevant considerations must be fairly, which means cooly, weighed with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.

"But the significance we attach to general principles may turn the scale when competing claims appeal for supremacy. Achievements of our civilization as precious as they were hard won were summarized by Mr. Justice Brandeis when he wrote that 'in the development of our liberty insistence upon procedural regularity has been a large factor.' Burdeau v. McDowell, 256 U. S. 465, 477, 41 S. Ct. 574, 576, 65 L. Ed. 1048 (dissenting). It is noteworthy 'that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonably notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence.' In re Oliver, 333 U. S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682. 'The hearing, moreover, must be a real one, not a

sham or a pretense.' Palko v. State of Connecticut, 302 U. S. 319, 327, 58 S. Ct. 149, 153, 82 L. Ed. 288. Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, e. g., Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027. Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated. Ownbey v. Morgan, 256 U. S. 94; 41 S. Ct. 433, 65 L. Ed. 837; Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285, 45 S. Ct. 61, 69 L. Ed. 288; see Cooke v. United States, 267 U. S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767.

"It is against this background of guidance considerations that we must view the rather novel aspects of the situation at hand. It is not true that the evils against which the Loyalty Order was directed are wholly devoid of analogy in our own history. The circumstances attending the Napoleonic conflicts, which gave rise to the Sedition Act of 1798, 1 Stat. 596, readily came to mind. But it is true that the executive action now under scrutiny is of a sort not heretofore challenged in this Court. That of itself does not justify the ex parte summary designation procedure. It does make it necessary to consider its validity when judged by our whole experience with the Due Process Clause.

"The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if ex-

plicit language does not preclude, so as to observe due process in its basic meaning. See, e. g., Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143; American Power & Light Co. v. Securities and Exchange Commission, 329 U. S. 90, 107-108, 67 S. Ct. 133, 1943, 91 L. Ed. 103; Wong Yang Sung v. McGrath, 339 U. S. 33, 49, 70 S. Ct. 445, 453, 94 L. Ed. 616. Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.

"The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness. It is in these instances that constitutional compulsion regarding fair procedure was directly in issue. Thus it has been held that the Constitution cannot be invoked to prevent Congress from authorizing disbursements on the ex parte determination of an administrative officer that prescribed conditions are met. United States v. Babcock, 250 U. S. 328, 39 S. Ct. 464, 63 L. Ed. 1011; cf. United States ex rel. Dunlap v. Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. Ed. 354. The importation of goods is a privilege which, if Congress clearly so directs, may likewise be conditioned on ex parte findings. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525; cf. Hilton v.

Merritt, 110 U. S. 97, 3 S. Ct. 548, 28 L. Ed. 83. Only by a close division of the Court was it held that at a time of national emergency, when war has not been closed by formal peace, the Attorney General is not required to give a hearing before denying hospitality to an alien deemed dangerous to public security. Ludecke v. Watkins, 335 U. S. 160, 68 S. Ct. 1429, 92 L. Ed. 881; United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537, 70 S. Ct. 309, 94 L. Ed. 317. Again, when decisions of administrative officers in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution. Bi-Metallic Inv. Co. v. State Board of Equalization of Colorado, 239 U. S. 441, 36 S. Ct. 141, 60 L. Ed. 372. Finally, summary administrative procedure may be sanctioned by history or obvious necessity. But these are so rare as to be isolated instances. Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 15 L. Ed. 372; Springer v. United States, 102 U. S. 586, 26 L. Ed. 253; Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385.

"This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principal basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the

course of centuries have come to be associated with due process. See Switchmen's Union of North America v. National Mediation Board, 320 U. S. 297, 64 S. Ct. 95, 88 L. Ed. 61; Tutun v. United States, 270 U. S. 568, 576, 577, 46 S. Ct. 425, 426, 70 L. Ed. 738; Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536. *And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.*

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and *fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.*

"An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point * * *.' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. Compare Brown, The French Revolution in English History. '*The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.*'

United States ex rel. Knauff v. Shaughnessy, 338 *U. S.* 537, 551, 70 *S. Ct.* 309, 317, 94 *L. Ed.* 317 (*dissenting*). *Appearances in the dark are apt to look different in the light of day.* (Emphasis added).

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. *No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.* Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

* * *

". . . The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however, conscientiously, in the name of security. Nor does he obtain immunity on the ground that designation is not an 'adjudication' or a 'regulation' in the conventional use of those terms. Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined

to past instances." 71 S. Ct. 643-650. (Emphasis added).

C. WOULD LEWIS' SIXTH AMENDMENT RIGHTS AND HER FIFTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, AND HER RIGHTS AS A DEFENDANT IN THE CASE AT BAR, OR EITHER, BE DENIED TO HER IF THE REASONS ALLEGED BY RESPONDENT AS ENTITLING HIM TO THE JUDGMENT ORDER OF THE DISTRICT COURT CONSTITUTES A NON-LITIGABLE AND NON-REVIEWABLE AND ADJUDICATION OR DETERMINATION.

To pose the above question is to answer it — yes! Sufficient citation of authority is found in *Hannah vs. Larche*, 363 U. S. 420, 494, 4. L. Ed. 2d 1307, 1357.

Congress cannot legislate one guilty of a crime or require a court to do so in an ex parte proceeding or where the *person* is denied the right of confrontation, the right of cross-examination, and has not had her day in court; and has not been permitted to make any defense, legal or factual, to the charges against her.

If the conclusionary allegations of the complaint, alleging the reasons why respondent said he is entitled to the automatic judgment order of the District Court are not litigable and not subject to Judicial determination or review or disproof such would constitute a finding of guilt of violating the Federal Criminal Statute Title 18, USC, Section 242 (printed in the Appendix as A5).

See: *McFarland vs. American Sugar Refining Co.*, 241 U. S. 79, 86, 60 L. Ed. 899, 904.

D. KENNEDY VS. LYND AND KENNEDY VS. OWEN HAVE NO JUDICIAL VALIDITY IN THE CASE AT BAR.

As apparent from the foregoing and the opinion and order in *Lynd* (A37-40) and the order in Kennedy vs. Owen (A41), the Fifth Circuit opinions were rendered when none of the matters therein decided by the Fifth Circuit had been presented to or passed upon by the District Court.

CONCLUSION

For the foregoing reasons, we respectfully request this Court to issue the said Writ of Certiorari so that these matters may be fully presented to and acted upon by this Court.

Respectfully submitted this 21st day of March, 1964.

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CERTIFICATE OF SERVICE

I, the undersigned, Dugas Shands, an Assistant Attorney General of the State of Mississippi, one of the Attorneys of Record for Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day mailed two true copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit with appendix thereto separately printed, postage prepaid, to Harold H. Greene, Attorney, Civil Rights Division, Department of Justice, Washington, D. C., and so mailed one true copy thereof the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D. C.

DONE AT WASHINGTON, D. C., this the 21st day of March, 1964.

s/ DUGAS SHANDS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi ..... Petitioner

vs.

ROBERT F. KENNEDY, Attorney General of the United States ..... Respondent

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APPENDIX 1

TEXT OF PERTINENT FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS; FEDERAL RULES OF CIVIL PROCEDURE; AND MISSISSIPPI STATUTES.

The Constitution of the United States

Amendment V:

> *No person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person* be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall* be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Empasis added)

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

PERTINENT FEDERAL STATUTES

United States Code

Title 28 U.S.C.

§1254. *Courts of Appeals; certiorari; appeal; certified questions.*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 U.S.C. Secs. 1974, 1974 a-e incl. (*Title III Civil Rights Act of* 1960; Secs. 301-306 incl., H. R. 8601, 86th Congress, 2nd Session)

§ 1974. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation.

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain

and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 1974a. Theft, destruction, concealment, mutilation, or alteration of records or papers; penalties.

Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 1974 of this title to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 1974b. Demand for records or papers by Attorney General or representative; statement of basis and purpose.

Any record or paper required by section 1974 of this title to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

§ 1974c. Disclosure of records or papers.

Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this subchapter, or any reproduction or copy, except to Congress and any com-

mittee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

§ 1974d. Jurisdiction to compel production of records or papers.

The United States district court for the district in which a demand is made pursuant to section 1974b of this title, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

§ 1974e. Definitions.

As used in this subchapter, the term 'officer of election' means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

§1291: *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Title 18, *U.S.C.* § 242. Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

PERTINENT FEDERAL RULES OF CIVIL PROCEDURE

Federal Rules of Civil Procedure, Rule 1 — Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

Rule 81 (a) (3), Federal Rules of Civil Procedure:

(a) To What Proceedings Applicable.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

PERTINENT MISSISSIPPI STATUTES

Mississippi Code 1942 Annotated

§2106. Elections—intimidating electors.

If any person shall, by illegal force, or threats of force, prevent, or endeavor to prevent, any elector from giving his vote, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or both.

§2111. Elections—fraud in registration of voters.

If any registrar appointed by law to register votes, shall intentionally refuse or neglect to register any voter entitled to registration, or register any voter not entitled to registration, he shall be punished, on conviction, by

imprisonment in the penitentiary not less than one year nor more than three years.

§3275. Penalties on election officers.

Any election commissioner, or any other officer or person acting as such, or performing election duty, who shall wilfully refuse or knowingly fail to perform any duty required of him by the election laws, or who shall violate any of the provisions thereof, shall be guilty of a misdemeanor, and, upon conviction, be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned in the county jail not less than ten days nor more than ninety days, or both.

APPENDIX 2

(From printed Record pages 181-182)

(181)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

IN RE MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI

No. D-C-1-61

ORDER

This cause came on for hearing by the court upon the application of Robert F. Kennedy, Attorney General of the United States, and the answer and motions of the respondent, Mrs. Walter Lewis, Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi; and the court having considered arguments of counsel and briefs for the respective parties, and being fully advised in the premises, is of the opinion and finds that each and every motion filed on behalf of the respondent should be overruled and that the application of Robert F. Kennedy, Attorney General of the United States, should be granted as hereinafter provided; and it appearing to the court that Title 42, U.S.C., § 1974, the statute upon which the application in this cause is predicated, applies only to general, special or primary elections at which candidates for the office of President, Vice-President, Presidential Elector, member of the Senate and member of the House of Representatives of the United States are voted upon; and, it further appearing that Title 42, U.S.C., § 1974,

requires voting registrars to preserve for twenty-two (22) months records relating to said elections; and, that the effective date of Title 42, U.S.C., § 1974, was May 6, 1960; and, that the demand made by the applicant in this cause was filed in this court on January 11, 1961; and, that the only elections conducted within twenty-two (22) months next preceding the filing of the application were

(182)

the primary election held on June 7, 1960, and the general election held on November 8, 1960, it is

Ordered:

That all motions filed on behalf of the respondent be and are hereby overruled.

2) That the demand of the applicant in this cause shall be and is hereby granted.

3) That Mrs. Walter Lewis, Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi, make available to said applicant or his representatives during reasonable business hours at the Registrar's offices at Cleveland, Mississippi, and Rosedale, Mississippi, for inspection, reproduction and copying, all records and papers which were in her possession on May 6, 1960, or which have come into her possession since May 6, 1960, and which relate to any application, registration, payment of poll tax, or other act requisite to voting relative to the eligibility of any listed voter eligible to vote in the primary election of June 7, 1960, and the general election of November 8, 1960.

4) That said inspection may begin promptly after date of this order and continue from day to day thereafter; and the applicant, or his representatives, shall complete

said inspection as quickly as reasonably possible with the least possible interference with the official business of said Registrar.

This the 16th day of November, 1962.

/s/ Claude F. Clayton
District Judge

Ent. C.O.B. 2, pp. 509-510, on November 16, 1962.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20411

ROBERT F. KENNEDY,
Attorney General of the United States,
Appellant-Appellee

versus

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi,
Appellee-Appellant

(AND REVERSE TITLE)

Appeal from the United States District Court for the Northern District of Mississippi

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U.S. COURT OF APPEALS
FILED
Sept. 18, 1963
EDWARD W. WADSWORTH
CLERK

Before WISDOM, GEWIN, and BELL, Circuit Judges

PER CURIAM:

It is ORDERED that the motions of the United States for summary reversal, and to affirm that part of the order from which appellee has taken a cross-appeal be, and

they are hereby DENIED; without respect however to the merits of the appeal and cross-appeal.

APPENDIX 3A

ARGUMENT AND SUBMISSION.

Extract from the Minutes of November 15, 1963

ROBERT F. KENNEDY, Attorney General of the United States

No. 20411

versus

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi.

On this day this cause was called, and after argument by Gerald P. Choppin, Attorney, Department of Justice, for appellant-appellee and Dugas Shands, Esq., Assistant Attorney General, for appellee-appellant, was submitted to the Court.

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APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20411

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant-Appellee,

versus

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County,

Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Mississippi

(December 6, 1963.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM: Although this is cast in the form of an appeal by the Attorney General, with a cross-appeal by the defendant Registrar of Elections of Bolivar County, Mississippi, the principal argument is put forward by the appellee. We have carefully analyzed each contention made on behalf of the appellee, Registrar Mrs. Lewis, touching on the propriety of the order of the District Court. We conclude that every issue pre-

sented by her attacking the order has been foreclosed by prior decisions of this Court.

The constitutionality of Title III of the Civil Rights Act[1] and its constitutionality when applied in the manner applied here by the District Court have been expressly sustained by *Kennedy v. Lynd*, 5 Cir., 306 F.2d 222, and *Kennedy v. Owen, et al*, 5 Cir., . . . F.2d . . . . We repeat here that the proceedings and hearing afforded to Mrs. Lewis fully comport with procedural due process and there is no substance in the attacks of the appellee on the constitutionality of this section of the law under the Fifth Amendment, the Sixth Amendment, or any other part of the Constitution.

When this Court made a similar statement in the *Owen* case, *supra*, one judge concurred specially, and commented "While I am not willing to go to the extent of holding the Civil Rights Acts of 1960 unconstitutional, I am also not willing to say that there *is no substance* in the attack on such acts in the context of this case. It seems appropriate for that question to be decided by the United States Supreme Court." In spite of that suggestion the County Registrars in the *Owen* case, represented by the Attorney General of the State of Mississippi, as is Mrs. Lewis here, sought no writ of certiorari from the Supreme Court.

Now the same questions are raised again by the same counsel. The answer must be the same. The order of the trial court is affirmed so far as it is challenged by the appellee-cross appellant.

The Government, however, appeals on the ground that the trial court improperly limited the Attorney General's

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[1]Public Law 86-449, Title III §301-306, May 1960, 42 U.S.C.A. §1974.

right to inspect and copy to only those records which pertained to the primary election of June 7, 1960 and the general election of November 8, 1960. It also limited the right to inspect to documents relating to any "act requisite to voting relative to the eligibility of *any listed voter eligible to vote* in the primary election, etc." (Emphasis added) This, as the Government points out, restricts the investigation to the records pertaining to those who have successfully sought to qualify.

Both of these limitations are invalid. To limit the inquiry to the records touching on any specified election and not to permit inspection as to papers in the office subsequent to the date of the filing of the suit dealing with subsequent registrations or elections is to construe the statute too narrowly. Equally, to limit the inspection to the documents on file relative to those *who have become qualified*, completely denies the Attorney General an opportunity to inspect the records as to those who may have been illegally denied the right to qualify. This is really what the investigation is all about.

This Court has heretofore in the *Owen* case, *supra*, indicated the kind of order that is required in such a case as this. The order of the District Court in this case must be amended to grant the same right to inspect and copy as was ordered there, without any of the limitations included in the challenged order.

The judgment is AFFIRMED in part and ordered MODIFIED in part and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term. 1963

No. 20411

D. C. Docket No. D-C-1-64

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant-Appellee,

versus

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County,

Appellee-Appellant.

(AND REVERSE TITLE)

Appeal from the United States District Court for the Northern District of Mississippi

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and modified in part in accordance with the opinion of this Court; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with said opinion.

It is further ordered and adjudged that the appellee-appellant, Mrs. Walter Lewis, Circuit Clerk and Registrar of Elections of Bolivar County, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 6, 1963

Issued as Mandate:

APPENDIX 6

[158]—Tuttle

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20411

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant-Appellee,

v.

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County,

Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Mississippi

(JANUARY 28, 1964)

U.S. COURT OF APPEALS
FILED
Jan. 28, 1964
EDWARD W. WADSWORTH
CLERK

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX 7

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20411

ROBERT F. KENNEDY, Attorney General of the United States

Appellant,

versus

MRS. WALTER LEWIS, Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi

Appellee.

(AND REVERSE TITLE)

ON CONSIDERATION OF THE APPLICATION of the Appellee-Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee-Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of twenty days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within twenty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of twenty

days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 20th day of February, 1964.

s/ ELBERT P. TUTTLE
United States Circuit Judge.

(ORIGINAL FILED—FEBRUARY 20, 1964)

APPENDIX 7A

(Extension of Stay in above case, Appendix 7)

O R D E R

Upon consideration of the application of appellee-appellant, Mrs. Lewis, in the above numbered and entitled cause for an extension of time of stay of the mandate of this Court, heretofore granted on the 20th day of February, 1964, it is now ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for an additional period of ten days, or until and including Saturday, March 21, 1964 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that on or before said March 21, 1964, there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the said extended stay; unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

DONE at Atlanta, Georgia, this March 9, 1964.

s/ Elbert P. Tuttle
Elbert P. Tuttle, Chief Judge
Fifth Circuit

APPENDIX 8

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19636

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

No. 19737

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

MRS. MARY K. BRYCE, REGISTRAR OF VOTERS OF BOSSIER PARISH, LOUISIANA,

Appellee.

No. 19738

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

MRS. WINNICE J. P. CLEMENT, REGISTRAR OF VOTERS OF WEBSTER PARISH, LOUISIANA,

Appellee.

No. 19739

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

SIDNEY WELLS PLATT, REGISTRAR OF VOTERS OF DESOTO PARISH, LOUISIANA,

Appellee.

No. 19740

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

versus

U. CHARLES MITCHELL, REGISTRAR OF VOTERS OF CADDO PARISH, LOUISIANA,

Appellee.

Appeals from the United States District Court for the Western District of Louisiana.

(July 11, 1962)

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: These cases from two District Courts in two States raise in a number of different procedural ways the central question of the proper disposition of a Title III proceeding by the United States Attorney General for appropriate court orders to obtain "inspection, reproduction, and copying" of voter records. Public Law 86-449, Title III, §§ 301-306, May 1960, 42 USCA § 1974.

A consideration of these two groups of cases from as many courts and states reflects a further common thread —a basic misconception by the respective trial Judges concerning a Title III proceeding. As this is a matter of recurring importance, we think it appropriate to make plain again that which we have tried so painstakingly to make plain before. That includes, without any reservations whatsoever, a reiteration of our prior decisions. These start with *In re Dinkens*, 5 Cir., 1961, 285 F.2d 430, approving and adopting the opinion and decision of Judge Johnson in *State of Alabama* v. *Rogers*, M.D. Ala., 1960, 187 F. Supp. 848; and the two subsequent decisions, *Kennedy* v. *Bruce*, 5 Cir., February 5, 1962, 298 F.2d 860; and *United States* v. *Lynd*, 5 Cir., April 10, 1962, 301 F.2d 818. A restatement of these principles will, we think, readily indicate the proper disposition of each of the individual cases.

At the outset we emphasize again that the filing of the application by the Attorney General is not the commencement of an ordinary, traditional civil action with all of its trappings. It is, however, comparable to the form of a traditional order to show cause, or to produce in aid of an order of an administrative agency. It certainly has the requisites of a "case or controversy" to satisfy the requirements of Article III of the Constitution. *In re Summers*, 1945, 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed.

1795; *Aetna Life Ins. Co. of Hartford v. Haworth*, 1937, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617. There are adversaries—the Attorney General seeking an order against the objecting State official as custodian. § 1974 b. The dispute is real and present as the application seeks "appropriate process," § 1974 d, in order "to compel the production" of records or papers demanded by the Attorney General in writing. § 1974 b. That by its terms and operation, Title III narrowly circumscribes the issues upon which the Court is to act does not make the proceeding or that determination any less judicial. For "in passing upon the application [to issue or not issue an order to produce] the court exercises judicial judgment. It does not confer or withhold a favor." *Tutun v. United States*, 1926, 270 U.S. 568, 578, 46 S. Ct. 425, 70 L. Ed. 738.

But this is not, we repeat, the ordinary civil action. It is a special statutory proceeding in which the courts play a limited, albeit vital, role. In words adopted as our own, we said that Title III provides "an effective means whereby preliminary investigations of registration practices can be made in order to determine whether or not such practices conform to constitutional principles." 187 F. Supp. 848, 853. Relying on the principles expounded in *Hannah v. Larche*, 1960, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307, we translated them effectively in specific terms of a Title III proceeding. "Here the function sought to be exercised by the Attorney General is—as in Hannah—purely investigative." 187 F. Supp. 848, 854.

Since it is a special statutory proceeding, it does not require pleadings which satisfy usual notions under the Federal Rules of Civil Procedure. All that is required is a simple statement by the Attorney General that after a § 1974 b written demand for inspection of records and papers covered in § 1974, the person against whom an

order for production is sought under § 1974 d has failed or refused to make such paper "available for inspection, reproduction, and copying * * *."

There is no place for a motion for a bill of particulars or for a more definite statement under F. R. Civ. P. 12 (e). There is no place for any other procedural device or maneuver—either before or during any hearing of the application—to ascertain the factual support for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose therefor" as set forth in the written demand. § 1974 b. Thus with respect to the reasons why the Attorney General considers the records essential, there is no place, either as a part of pleadings, discovery, or trial, for interrogatories under F. R. Civ. P. 33, oral depositions of a party under F. R. Civ. P. 26 (a), 30, production of documents under F. R. Civ. P. 34, or request for admissions as to facts or genuineness of documents or other things under F. R. Civ. P. 36, 37. The same is true as to the nature, kind or specification of the records and papers sought, the names, identities or addresses of persons thought to have received discriminatory treatment, whether favorable or adverse, and the like.

On the filing of this simple statement by the Attorney General, the Court is required to treat it as a summary proceeding. The Court, with expedition, should grant the relief sought or, if the respondent-custodian opposes the grant of such relief, the matter should be set down without delay for suitable hearing on the matters open for determination. These are, of course, severely limited. In the event of a genuine dispute thereon, it would be in order for the Court to determine whether the written demand has been made, § 1974 b, or whether the custodians against whom orders are sought have been given reasonable notice of the pendency of the proceeding. On the other

hand, the factual foundation for, or the sufficiency of, the Attorney General's "statement of the basis and the purpose" contained in the written demand, § 1974 b, is not open to judicial review or ascertainment. Nor is the scope of the order to produce insofar as it concerns the nature of the records or papers. This is so because the papers and records subject to inspection and demand have been specifically identified by Congress. The Attorney General is entitled to have made available for his "inspection, reproduction and copying" in the custodian's office "any record or paper" which § 1974 requires "to be retained and preserved." The incorporated standard of § 1974 is sweeping. Every election officer is required to retain and preserve "* * * all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting" in the specified elections for federal offices.[1] If, after issuance of an order to produce, a genuine dispute subsequently arises as to whether or not any specified particular paper or record comes within this broad statutory classification of "all records and papers * * * relating to any * * * act requisite to voting," the Court would, of course, be open for its determination.

Likewise, there is no question for judicial determination as to how far back the records go. This, too, is fixed by the statute. In other words, Congress has determined *what* records are to be retained and subject to production. Since the statute specifies "all records and papers" in the

1. The time and the nature of the elections are tied together as § 1974 provides that all such records shall be retained and preserved "for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President; presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for * * *."

officer's custody "relating to any application * * * or other act requisite to voting * * *," in such elections held within twenty-two months, the custodians' duty to retain and preserve and the Attorney General's right of inspection and copying extend as far back as the earliest date of any such record or paper which bears on the eligibility of any currently listed voter to vote in such election.[2] If after granting the order as to all such records back to the time of the earliest federal election within the 22-month period preceding the filing of the § 1974 application, any substantial question arises concerning the most remote date beyond that time, the court will be open to determine that issue on the basis of the statutory standard. But the cutoff date is in no way related to the identity or status of "the person having custody, possession, or control," § 1974 b, or the time at which any such person acceded to or terminated such office.

Similarly, the right of the Attorney General to inspect and copy such records is not dependent upon an existing demonstrable right in the United States or the Attorney General to successfully maintain an injunction suit under, or similar to, § 1971 (a)-(f) against any present or preceding election officer. His right to records does not require that he show he could win without them. The right of the Attorney General to secure judicial enforcement of the written demand, § 1974 b, is not affected in any way by the pendency of a § 1971 case or the right of discovery

2. Thus, for example, in Alabama where registration is permanent and reregistration is not required, this would extend as far back as the earliest application for registration of any person eligible to vote in the most recent federal election. See *State of Alabama* v. *United States*, 5 Cir., 1962, ___ F 2d ___, note 7 and appended text (No. 19051, June 1, 1962). Provision is made in Louisiana also for certain permanent registrations. See L.R.S. 18:231-261, Acts 1952, No. 415, § 2 as amended Acts 1954, No. 256, § 1 *et seq.*

in such case under the Federal Rules of Civil Procedure. The two proceedings are distinct and distinctively separate.

This analysis demonstrates the narrowly confined issues open for judicial review or ascertainment. The restricted substantive nature of the proceeding consequently limits in like manner the place of, the resort to, or the application of procedural rules or devices as well as the scope and nature of any hearings required and the evidence admissible thereon.

With these principles clearly in mind, the disposition of each of the separate cases is readily made.

No. 19636

Lynd, Registrar Forrest County, Mississippi

There is no necessity for going into any detail. It suffices to say that over 18 months ago the Attorney General on January 19, 1961, filed his Title III application for an order requiring the Registrar to make available for inspection and copying all records or papers in his possession relating, in the words of the statute, to the elections for federal office. This was to secure the inspection demanded in writing on August 11, 1960. After a series of motions, motions to dismiss; opposing substitution, motions for more definite statement and briefs and repeated extended oral arguments thereon, but with no clear-cut ruling, no indication that this interminable proceeding would ever come to an end, and certainly never an order for production, the District Court effectually denied the Attorney General's applicatoin.

The stated reason was that subsequent to the § 1974 application, the Attorney General in the name of the United States filed a § 1971 complaint against Lynd, as Registrar,

seeking injuctive relief for discriminatory practices.[3] In the course of that proceeding, and on the Government's broader motion under F. R. Civ. P. 34, the Court had ordered the production of certain, but limited, voter records. The Government contends that this Rule 34 order was too restricted, but this issue is not before us directly. The District Court in its opinion concluded that "the Attorney General has instituted two separate suits against the same defendant and that the later [§ 1971 discrimination] suit embraces all of the subject matter contained in the former [§ 1974] suit." Consequently, the Court went on, by filing his Rule 34 motion the Attorney General "thereby abandoned in its entirety" the § 1974 application so that "the entire cause of action now pending before" the District Court in both the § 1974 and § 1971 cases "is embraced and contained in * * * [the § 1971] amended complaint and motion under Rule 34." On the basis of that the Court ruled that all of "the six motions pending in [the § 1974 proceeding] have been rendered and are academic and moot by reason of the abandonment of said * * * suit * * *." Then to snuff out the last vestige of life in this abandoned cause the Court, administering the *coup de grace*, declared that it "adjudges [the § 1974 proceeding] as abandoned and effectually nonexistent." On the basis of this opinion incorporated expressly in his order, the District Court then "ordered that this cause, and the complaint * * * be and the same are hereby remanded to the files of this Court."

We first reject the contention that this was not such a final order as to be appealable, 28 U.S.C.A. § 1291, *United States* v. *Wood*, 5 Cir., 1961, 295 F.2d 772, 777.

3. It was nonaction in this very case, construed by us to be an effectual denial of preliminary relief, that led to our injunction pending appeal in *United States* v. *Lynd*, 5 Cir., April 10, 1962, 301 F.2d 818.

On the merits, the action is clearly wrong. The Title III proceeding is investigative in nature. Its purpose is to enable the Attorney General to determine whether § 1971 suits or similar actions should be instituted. And it is to enable him to obtain evidence for use in such cases if and when filed. The Attorney General does not exhaust the § 1974 right which Congress accorded to that office by the filing of a § 1971 injunction suit. The discovery mechanisms available in such injunction action are necessarily geared to that particular claim. Questions of relevancy or good cause or other like considerations which must be evaluated in the injunction suit are completely foreign to the summary proceeding under § 1974.[4] Indeed, one of the clearest purposes of the Title III proceeding is to enable the Attorney General to assemble all of the voter record information within the time-reach of the statute relating to all persons as to whom there is a question concerning infringement or denial of their constitutional voting rights. Wide scope must be accorded the Attorney General in the facilities for adequate investigation. Relief under § 1971 (c) is not confined to named individual voter officials but extends as far as the sovereign State itself. The establishment of a discriminatory "pattern or practice" sets in motion the extraordinary remedies of § 1971 (e). Establishing a "pattern or practice" of such discrimination may go back many, many years. *State of Alabama v. United States*, 5 Cir., 1962, ____ F.2d ____ [No. ____

4. This is not to disparage the wonderful flexibility of such discovery weapons. Thus, for example, the scope of examination in pretrial depositions under F. R. Civ. P. 26 (b), and for production of documents under F. R. Civ. P. 34 in a § 1971 suit might well have to go back many, many years as a basis for establishing a pattern or practice of discrimination, § 1971 (e), or in leading to the "discovery of admissible evidence," F. R. Civ. P. 26 (b), to establish such pattern. At the same time, depending on the local registration system, the Attorney General's right under § 1974 might go back only 22 months, § 1974.

19051, June 1, 1962]. Clearly within the time cutoff period of § 1974, the Attorney General, in fulfillment of the duties imposed upon him by the Civil Rights Act of 1957 and 1960, is entitled to inspect and copy all of the voter papers and records as defined.

There is no longer any question about the respondent Lynd having actual notice of this application. The record establishes without contradiction that the § 1974 b written demand was made and that it adequately stated the basis and the purpose therefor.[5] There is nothing left in dispute. Consequently, the order of the District Court must be vacated, and the District Court is directed to grant without further delay the application to have these records made "available for inspection, reproduction, and copying at the principal office of such custodian" as requested. The mandate of this Court shall issue forthwith.

No. 19737 — *Bossier Parish*
No. 19738 — *Webster Parish*
No. 19739 — *DeSoto Parish*
No. 19740 — *Caddo Parish*

These cases were consolidated and heard together, both below and here. The District Judge, acutely aware of our prior decisions in *Kennedy* v. *Bruce*, 5 Cir., February 5, 1962, 298 F.2d 860, the earlier approval of Judge Johnson's decision and our even more recent decision in *United States* v. *Lynd*, 5 Cir., April 10, 1962, 301 F.2d 818, displayed an earnest concern that the decision comply fully with the principles we had announced. Despite the heavy demands of that busy District, Judge Dawkins heard and decided all four of these § 1974 applications within sixty days of their filing by the Attorney General on April 4.

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5. It was substantially in the same words as the Louisiana demands, see note 6, *infra*.

1962. In each case there was an identical written demand, § 1974 b, and an express refusal upon the part of each Registrar to comply.[6]

The District Judge applying, as he was bound to, the principles we have expounded rejected the contentions asserted by each of the Registrars that the statement of "the basis and purpose therefor" in the letter demand was inadequate; that the demand as made would be in conflict with applicable Louisiana statutes; that there was no necessity for the inspection (at least in two Parishes) since there was no discrimination; and that Title III was unconstitutional. As to two of the Parishes, further objection was made that all or a part of these records had already been inspected and copied by the United States Civil Rights Commission. There was also an effort to limit any inspection and copying to a period of 22 months after November 6, 1961, or 22 months after the November, 1962, election. The Registrars also sought specific conditions limiting the number of representatives of the United States Attorney General, approval by the Court of the copying methods, and prohibiting the inspectors from questioning the Registrar's staff. All of these the District Judge, for adequate reasons, likewise overruled. As he was compelled to do, the Judge also rejected the contention that the Attorney General be required to specify the records.

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6. The letter of United States Attorney General made this "statement of the basis and the purpose therefor," § 1974 b:

"This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.

"The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred."

Having done that, the District Court then proceeded to enter orders granting the right of inspection and copying, but he attached certain conditions to which the United States Attorney objects. It is our conclusion here that these conditions were erroneously attached and, as in the other case, this largely resulted from a basic, though more narrowly confined, misconception of the nature and purpose of a Title III proceeding.

As to Bossier and Webster Parishes, the Court declined to allow inspection and copying of records prepared or compiled prior to April 1, 1961, on the ground that in April, 1961, the United States Civil Rights Commission had inspected and copied voting records in those Parishes. To the Attorney General's suggestion that the Department of Justice might not be able to get these records from the Civil Rights Commission, the Judge then provided that upon such a showing the order would be modified to allow inspection and copying of all voting records subsequent to the accession to office of the present Registrars.

We think this misconceives the underlying nature of a Title III proceeding. Congress has specifically committed the investigative responsibility to the Attorney General and has equipped him with machinery thought suitable for the effective fulfillment of that obligation. Congress has specified the person *who* shall seek. It has specified as well the person from *whom* the information shall be obtained. The latter is, of course, the custodian of the records, not the Federal Civil Rights Commission.

Undoubtedly Judge Dawkins—probably from his intimate contact with the work of the Civil Rights Commission as it came before his Court in the activity leading to *Hannah* v. *Larche*, 1960, 363 U.S. 420, 80 S. Ct. 1502, 4 L.

Ed. 2d 1307—felt that this current contemporary demand was oppressive and burdensome because it was a complete duplication. Where a District Judge actually finds that this is the situation, we have no doubt that in administering § 1794 d the power and duty to issue "appropriate process to compel the production" of such records and papers will include the power and duty to issue protective orders as well. But it seems quite likely from a consideration of the reports of the Civil Rights Commission to which we have been directed as a matter of judicial knowledge that a number of the records and papers which might well be important to the Attorney General were not copied by that Commission whose statutory function is quite different. Undoubtedly overlooked, also, was the technical problem facing the Attorney General in the future use of copies made or obtained from copies in the custody of the Civil Rights Commission. On the other hand, authenticity and admissibility of those made in the office of the Registrars would be quite clear. 28 U.S.C.A., §§ 1731, 1732.

The District Court was likewise in error in refusing to require the Registrars to produce those records prepared or compiled prior to the incumbency of the present Registrar. This was done presumably on the theory that the present Registrar could not be held responsible for acts and practices of his predecessors. This is again the basic error of confusing a Title III proceeding with an action for injunctive or other relief under § 1971. Here the Registrar is a party, not because the Attorney General is seeking a judicial declaration that such official has violated federal statutes or constitutional rights. The Registrar is a party because he is, in the words of the statute, the "officer of election," § 1974 e, and is the "person having custody, possession, or control of such record,"

§ 1974 b. The statute, subject only to the time cutoff prescribed, requires the retention and preservation of "all records and papers which come into his possession relating to any * * * act requisite to voting * * *." § 1974. All means all. The responsibility of such "officer of election" is not confined to records which are compiled subsequent to his taking office. His responsibility is as extensive as the cutoff date and whatever has come into his custody, possession or control from his predecessors, he must faithfully keep under the sanction of a fine or imprisonment if he "wilfully fails to" retain and preserve them as required, § 1974. As pointed out above, under § 1971 (c) and (e), the records and papers have an immediate importance as a likely source of significant information in determining the existence of a "pattern or practice" or conduct by current or prior voting officials which will "also be deemed that of the state."

We think also that it was erroneous for the District Court to prescribe that the inspection and copying should not commence until after September 1, 1962. The Court was, we know, concerned about possible interference with the performance of regular duties by these Registrars, several in very cramped and perhaps limited quarters, in connection with the primary election to be held in Louisiana on July 28, 1962, with the possibility that this would be followed by another primary on September 1. But we do not think that the record made before the District Court affords any real convincing reason why this much delay is required. For a proceeding commenced in April, 1962, the disposition would hardly be the prompt one which our decisions require if effective compliance is to be postponed five months. We think two things are of great importance in dealing with this problem. First, we are not discussing confidential, private papers and effects.

We are, rather, dealing with public records which ought ordinarily to be open to legitimate reasonable inspection and which by nature relate directly to the most vital of all public functions—the franchise of the citizen. Next, once it is recognized—as it surely must be now—that this act of Congress is valid and that Court decisions unmistakably indicate that the congressional objective of a prompt and expeditious inspection is to be achieved, we think there is really nothing to these mechanical objections. Copying 100 or 1,000 sheets would, at one time, have been a formidable thing. Modern photostating equipment will make short order of most of these demands, and where the task is more complicated because of volume or the pressure of contemporary interruptions for normal office operation, we are confident that with only slight personal adjustments, the agents of these dual sovereigns should be able to work out a reasonable schedule without putting that policing task upon the overburdened shoulders of a United States District Judge.

The result is that we sustain the appeal of the Attorney General. We hold that each of the conditions attached to the order to produce was erroneous. But in all other respects the orders were proper. Consequently, we reject all of the attacks asserted by the appeals (or cross appeals) of the Registrars. The orders are modified by deleting the conditions which we have found to be erroneous. As thus modified, the orders are affirmed and remanded to the District Court to fix consistent with this opinion a beginning time for the inspections. The mandate of this Court shall issue forthwith.

APPENDIX 9

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

Civil Action File Number 1604

IN RE THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI

This case is presented on motion to quash the demand of the Attorney General made on respondent under 42 U.S.C.A., Section 1974b, motion for a more definite statement of the *basis* and *purpose* for said demand and four separate motions of the respondent to dismiss the suit.

The discovery was not supplied by the respondent pursuant to the demand of the Attorney General and this suit was accordingly filed as an ex parte case pursuant to 42 U.S.C.A., Section 1974d. These statutes were apparently designed and intended to operate as an administrative procedure for obtaining discovery without suit if possible and with suit if necessary. The statute does not expressly authorize an ex parte action for this purpose and it would appear to the Court that if the statutory demand is refused that the necessary action would be adversary in form and in fact but that observation is unimportant now.

This suit was commenced by an instrument captioned Application for Order to Produce Records for Inspection, Reproduction and Copying which was filed in this court on January 19, 1961, as Cause Number 1604 on the docket of this court. Subsequently, on July 6, 1961, the Attorney General filed the complaint of United States of America

against Theron C. Lynd, Circuit Court Clerk and Registrar, Forrest County, Mississippi, et al., under 42 U.S.C.A., Section 1971, et seq. as Cause Number 1646 on the docket of this court. On October 10, 1961, the Attorney General filed an amended complaint in said Cause Number 1646 styled United States of America, Plaintiff, v. Theron C. Lynd, et al., Defendants, seeking the injunctive relief provided for in said Act and accompanied by a motion under Rule 34 of the Federal Rules of Civil Procedure to require the Defendant to produce and permit the inspection and copying of the same records sought in Cause No. 1604 on the docket of this court, aforesaid.

It is the opinion of this Court under the circumstances that the Attorney General has instituted two separate suits against the same defendant and that the later suit embraces all of the subject matter contained in the former suit; and that when the complaint in Cause No. 1646 was filed accompanied by its Rule 34 motion that the Plaintiff thereby abandoned in its entirety said Cause Number 1604; and that when the Plaintiff filed its amended complaint in Cause No. 1646 on October 10 and filed its motion under Rule 34 under said amended complaint on October 18, 1961, that it abandoned the original complaint; and that the entire cause of action now pending before this Court in Case No. 1604 and Case No. 1646 is embraced and contained in said last mentioned amended complaint and motion under Rule 34.

It is accordingly the opinion of the Court that the six motions pending In Re Theron C. Lynd, etc., No. 1604, have been rendered and are academic and moot by reason of the abandonment of said former suit by the subsequent suit in this court embracing the same subject matter and other relief therein requested. The Court, therefore, declines to act on either of said motions and adjudges Case

No. 1604 as abandoned and effectually non-existent and a proper order to the effect indicated may be presented for entry.

This January 15, A. D., 1962.

/s/ Harold Cox,
United States District Judge.

APPENDIX 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action File Number 1604

IN RE: THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES,

vs.

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI.

Order

(Filed February 16, 1962, Loryce E. Wharton, Clerk, By: Margaret Estes, Deputy, Southern District of Mississippi.)

Pursuant to memorandum opinion of this Court issued on January 15, 1962, which is made a part hereof, it is hereby ordered that this cause, and the complaint and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the files of this Court.

ORDERED, ADJUDGED AND DECREED, this the 16th day of February, 1962.

/s/ Harold Cox
United States District Judge

APPENDIX 11

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20634

ROBERT F. KENNEDY,

Appellant,

versus

R. APPLETON OWEN, Circuit Court Clerk and Registrar, Jefferson County, Mississippi; LEONARD B. CAVES, Circuit Clerk, Jones County, Mississippi; J. E. McDAVID, Circuit Clerk, Noxubee County, Mississippi; A. V. DAVIS, JR., Circuit Court Clerk and Registrar, Adams County, Mississippi; R. WHITAKER, Circuit Court Clerk and Registrar, Wilkinson County, Mississippi; MRS. JOHN MIKELL, Circuit Clerk, Marion County, Mississippi; and TALMADGE S. SAUCIER, Circuit Clerk, Lamar County, Mississippi,

Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(July 3, 1963.)

Before TUTTLE, Chief Judge, and RIVES and GEWIN, Circuit Judges.

PER CURIAM: These consolidated cases came on for hearing on the motion for summary reversal by appellant in each case. The demand letter attached to each application was addressed to the appellee followed by the words "Circuit Clerk." Each appellee was in fact both Circuit Clerk and Registrar. The district court granted an inspection order as to the records each appellee possessed in his capacity as Circuit Clerk, but not as to the records in his custody as Registrar. The statute provides simply for a "demand in writing by the Attorney General or his representative directed to the *person* having custody, possession, or control of such record or paper . . . ." (Emphasis supplied.) 42 U.S.C.A. §1974b (Supp. 1962).

So long as the demand was addressed to and received by the proper person, it is immaterial that he was described as "Circuit Clerk" and was not also described as "Registrar." The person must comply with the statute as to any record or paper required by Section 1974 of Title 42 to be retained and preserved, and which is in his custody, possession or control in any capacity.

There is no substance in the attacks of the appellees on the constitutionality of Title III of the Civil Rights Act of 1960 (P.L. 86-449, 74 Stat. 86, 42 U.S.C.A. §1974, et seq.) under the Fifth Amendment, the Sixth Amendment, or any other part of the Constitution. See *State of Alabama, ex rel Gallion v. Rogers*, M.D. Ala. 1960, 187 F.Supp. 848, affirmed 5 Cir. 1961, 285 F.2d 430; *Kennedy v. Lynd*, 5 Cir. 1962, 306 F.2d 222, certiorari denied 371 U.S. 952.

It is therefore ORDERED:

That the judgments be, and they are hereby, reversed, and the causes are remanded to the District Court for the Southern District of Mississippi with in-

structions to grant forthwith the applications filed by the Attorney General of the United States and to order each appellee to make available to said Attorney General or his representative, for inspection, reproduction and copying, during reasonable business hours, all records and papers in the possession, custody or control of said appellee relating to any application, registration, payment of poll tax or other act requisite to voting in any primary, special or general election for Federal office in Mississippi, such inspection, reproduction and copying to take place in accordance with a schedule to be established forthwith by the District Court, and to commence forthwith in one of the seven counties herein involved, and upon completion thereof to commence in another of the seven counties, and to continue in such manner, county by county and in consecutive order, until such inspection, reproduction and copying is completed.

It is further ORDERED that appellees' cross-appeals be, and they are hereby, DISMISSED.

It is further ORDERED that the mandate issue forthwith. See Rule 32 of Fifth Circuit, as amended May 31, 1963.

JUDGE GEWIN CONCURS SPECIALLY.

GEWIN, Circuit Judge, CONCURRING SPECIALLY:

I concur in the result reached, because it is quite apparent that if the demand delivered to the state officials had been addressed to them in their capacity as Circuit Clerk and as Registrar, the District Court would have granted the relief sought. It is somewhat technical to require that the demand describe the official both as Circuit Clerk and as Registrar when one person is acting in both capacities. It seems appropriate to mention how

ever, that this appeal and a good deal of trouble could have been avoided if the officials making the demand had amended it to meet the objection raised.

As to the constitutional point asserted, I am not quite as positive that there is no substance in the attack on the statutes in question, as the opinion indicates. Some of the statutes involved here have ominous overtones. 42 U.S.C.A. 1974(c) prohibits the disclosure of any record or paper produced pursuant to the statute with certain exceptions, one of which is: ". . . and in the presentation of any case or proceeding before any court or *grand jury*." (emphasis supplied.) 18 U.S.C.A. 242 authorizes fine and imprisonment for ". . . the deprivation of any rights, privileges, or immunities secured or protected by the constitution and laws of the United States. . . ". It is not clear that the procedure here involved can be equated with the holding in *Hannah v. Larche, et al.*, 363 U.S. 420. That case involved action by the Federal Commission on Civil Rights under another statute. The instant proceeding is by the Attorney General of the United States assisted by agents of the F.B.I. When the law speaks of grand juries, punishments, the Attorney General, the F.B.I., and similar agencies, one naturally thinks of the rights secured by the Fifth and Sixth Amendments. While I am not willing to go to the extent of holding the Civil Right Acts of 1960 unconstitutional, I am also not willing to say that there *is no substance* in the attack on such acts in the context of this case. It seems appropriate for that question to be decided by the United States Supreme Court.

APPENDIX 12

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CIVIL ACTION NO. 1029

IN RE R. APPLETON OWEN, CIRCUT COURT CLERK AND REGISTRAR OF JEFFERSON COUNTY, MISSISSIPPI, FAYETTE, MISSISSIPPI

O R D E R

This cause having come on for hearing upon the application of Robert F. Kennedy, Attorney General of the United States, and the motion to dismiss by the respondent R. Appleton Owen, and this Court having heard argument of counsel and having considered the relevant authorities and being fully advised in the premises, is of the opinion and finds that the motion to dismiss by the respondent should be and is overruled, and the respondent having presented his objections to and defenses against the application no further pleading is necessary to enable this Court to rule, and that the application of Robert F. Kennedy, Attorney General of the United States should be granted only as to the records in the custody of the respondent in his capacity as Circuit Clerk and not in his capacity as Registrar.

The applicant having insisted before the Court that his demand letter and his application to this Court en-

titled him not only to records in the hands of this officer as Circuit Clerk, but also in his hands as Registrar, and this Court being of the opinion that the demand letter circumscribed the applicant's rights denies said application as to the records in this official's hands in his capacity as Registrar since the demand letter was addressed to him as Circuit Clerk, it is therefore:

ORDERED that R. Appleton Owen, Circuit Clerk of Jefferson County, Mississippi, make available to said applicant or his representatives at the Circuit Clerk's office in Fayette, Mississippi, for inspection, reproduction and copying, by and at the expense of said applicant, all records and papers in the possession or under the control of said Circuit Clerk in his capacity as Circuit Clerk but not in his capacity as Registrar relating to any applications, registration, payment of poll tax or other act requisite to voting in primary, special or general elections for Federal office in Mississippi, it being understood this will not entitle the applicant to inspect, reproduce or copy any applications for registration or any registration or poll books or any other election records in the possession or under the control of the respondent in his capacity as Registrar, and the applicant, or his representatives, shall complete said inspection, reproduction and copying as quickly as reasonably possible with the least possible interference with the Circuit Clerk's official business.

It is further ordered that insofar as the application of the Attorney General seeks to inspect, reproduce and copy all records and papers relating to any application, registration, payment of poll tax or other acts requisite to voting in any general, special or primary election for Federal office, which papers are in the custody, possession or control of R. Appleton Owen in his capacity as

Registrar of Jefferson County, Mississippi, said application is hereby denied.

ORDERED AND ADJUDGED this 11th day of June A.D., 1963.

/s/ Harold Cox
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 938

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 325 F. 2d 210. The opinion of the district court (R. 181–182) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1963 (R. 203), and a petition for rehearing was denied on January 28, 1964 (R. 259). The petition for a writ of certiorari was filed on March 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to know and to have an opportunity to controvert the factual information upon which the Attorney General premised the statement of the basis and purpose for his demand under 42 U.S.C. 1974b and 1974d for the voting records in her custody.

2. Whether, assuming that 42 U.S.C. 1974b and 1974d do not require the Attorney General to divulge upon what information he premised his statement of the basis and purpose for the demand, the statute violates petitioner's rights under the Fifth and Sixth Amendments.

3. Whether, if the district court could not inquire into the substantiality of the Attorney General's statement of the basis and purpose for his demand, the district court's order granting the demand was unconstitutional on the ground that this matter was then no longer a case or controversy under Article III, Section 2.

STATUTE INVOLVED

Section 1974 of Title 42 U.S C., Supp. IV, provides:

> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act

requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 1974b of Title 42 U.S.C., Supp. IV, provides:

Any record or paper required by section 1974 of this title to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

Section 1974d of Title 42 U.S.C., Supp. IV, provides:

The United States district court for the district in which a demand is made pursuant to section 1974b of this title, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

STATEMENT

On August 11, 1960, the Attorney General of the United States, requested, pursuant to Section 303 of Title III of the Civil Rights Act of 1960 (74 Stat. 88, 42 U.S.C. 1974b), that petitioner, as the Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi, make available for inspection and copying various records and papers pertaining to registration and voting (R. 4–6). On September 15, 1960, petitioner declined to turn over the records (R. 8–10). On January 11, 1961, the Attorney General, pursuant to Section 305 of the Act (74 Stat. 88, 42 U.S.C. 1974d), applied to the District Court for the Northern District of Mississippi for an order requiring petitioner to permit inspection of the voting records of Bolivar County (R. 1–4).

On July 26, 1961, petitioner submitted numerous motions. One motion requested a more definite and certain statement, and several motions attacked the constitutionality of Title III of the Civil Rights Act of 1960 (R. 55–56). On November 28, 1961, the court granted in part petitioner's motion for a more definite statement. The court required the respondent to furnish within thirty days full details on the distinctions in voting on account of race or color upon which the respondent based his demand for voting records in Bolivar County (R. 107–108).

On December 26, 1961, the respondent filed his response which declined to furnish a more definite statement. On February 15, 1962, no further action having been taken by the district court on the matter, the respondent filed a motion for reconsideration of

the court's order for a more definite statement (R. 113). In this motion, respondent set forth the delays in the case in support of his request for prompt issuance of an order for the production of the records (R. 114–119). No action was taken by the court to set a hearing on the motion until the respondent petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus to compel the district court to act. *Kennedy* v. *Clayton*, No. 19732 (R. 129–130). Upon the district court's agreement to hear the matter, the respondent moved the court of appeals to defer argument and action on the mandamus (R. 129).

At the conclusion of the hearing on July 19, 1962, the district court set aside its order of November 28, 1961 (R. 140). On July 30, 1962, petitioner filed her answer in which she admitted that the Attorney General had made a demand (as described in his application) upon her for the voting records under her control and that she had refused to comply therewith (R. 141–145). She also reasserted her motions regarding the constitutionality of Title III of the Civil Rights Act of 1960 and moved to dismiss for failure to state a claim (R. 145–146). On November 16, 1962, the district court overruled all of petitioner's motions and granted the demand of the respondent, limited, however, to records and papers which related to the eligibility of any listed voter eligible to vote in the primary election of June 7, 1960, and the general election of November 8, 1960 (R. 182).

The respondent appealed (R. 182), and petitioner cross-appealed (R. 186). On December 6, 1963,

the court of appeals affirmed the judgment of the district court insofar as it was challenged by petitioner and ordered it modified to remove the limitations objected to by respondent. On January 28, 1964, the court of appeals denied a petition by petitioner for rehearing (R. 259).

ARGUMENT

This case was brought by the Attorney General under Title III of the Civil Rights Act of 1960 which was designed to give the Attorney General ready access to state voting records in order to prevent denial of the right to vote based on race. Consequently, the Act provides for summary enforcement procedures if state and local officials refuse to produce such records. Nevertheless, as the result of repeated delays by the district court (those described above and numerous others), the Attorney General's demand for records was not enforced (and then only in part) by the district court for over two years. The Court of Appeals for the Fifth Circuit affirmed the enforcement order and removed the limitations. This decision was correct and was consistent with earlier decisions of the Fifth Circuit, some of which this Court has declined to review. Similarly, in this case, there is no need for further review of the decision below.

1. Petitioner contends (Pet. 29) that, in a proceeding brought by the Attorney General under 42 U.S.C. 1974b, d, he is entitled to known and have the opportunity to controvert the factual information upon which the Attorney General premised the demand for voting records. This contention is patently erroneous.

The demand letter sent to the petitioner by the Attorney General stated (R. 4, 5):

> This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.
>
> The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of federal law in regard to registration and to voting have occurred.

Considering the summary nature of enforcement proceedings under Title III of the Civil Rights Act of 1960, these allegations were plainly sufficient. They state, in general terms, the basis and purpose of the Attorney General's demand. Section 1974b of the Act states that this is all that is necessary. Senator Keating, a principal spokesman for the Act, explicitly said on the floor of Congress that such a statement is sufficient. 106 Cong. Rec. 7767. And letters worded identically to this one have been held to be sufficient in *Kennedy* v. *Bruce*, 298 F. 2d 860, 863 (C.A. 5), *United States* v. *Lynd*, 301 F. 2d 818, 822 (C.A. 5), certiorari denied, 371 U.S. 893, *Kennedy* v. *Lynd*, 306 F. 2d 222, 226 (C.A. 5), certiorari denied, 371 U.S. 952, *Alabama ex rel. Gallion* v. *Rogers*, 187 F. Supp. 848, 854 (M.D. Ala.), affirmed *sub nom*, *Dinkens* v. *Attorney General*, 285 F. 2d 430 (C.A. 5), certiorari denied, 366 U.S. 913, and *Coleman* v. *Kennedy*, 313 F. 2d 867 (C.A. 5), certiorari denied, 373 U.S. 950.

2. Petitioner also claims (Pet. 34, 51) that if the courts below correctly interpreted 42 U.S.C. 1974b, d, as not requiring the Attorney General to divulge the

reasons and facts behind his statement of the basis and purpose for the demand, then the Act violates petitioner's rights under the Fifth and Sixth Amendments. Petitioner suggests that she has a right to confrontation and cross-examination of the persons who furnished the information in the Attorney General's possession constituting the basis of his inspection demand.

This contention is without merit for three reasons. First, the materials ordered to be produced are records pertaining to federal elections. Therefore, the State's right *vis-à-vis* the federal government is limited. Surely, the United States has the bare right to inspect and copy these official records pursuant to statutory authorization without a full trial of the need for the records.

Second, this Court rejected a similar contention in *Hannah* v. *Larche,* 363 U.S. 420. In that case, the Civil Rights Commission was attempting to compel the testimony of witnesses, whereas here the Attorney General sought only the inspection and copying of records. Yet the Court there held that the due process clause does not require that in an investigation, as opposed to an adjudicatory proceeding, persons under investigation be informed of the identity of the complainants or be given the right to cross-examine them. *Id.* at 440–453. And the Court further observed that the Sixth Amendment "is specifically limited to 'criminal prosecutions' * * *." *Id.* at 440, note 16. Similarly here, the inspection and copying of records by the Attorney General is part of an investigation, not a criminal prosecution or ad-

judication. Indeed, the Attorney General has no power to adjudicate; he may merely initiate a law suit. See *Kennedy* v. *Lynd, supra,* 306 F. 2d at 225, 228; *Alabama ex rel. Gallion* v. *Rogers, supra,* 187 F. Supp. at 854.

Third, the records subject to the demand are not the registrar's—they are the State's. Accordingly, the registrars may not object to the surrender of these records on grounds which relate only to themselves. See *Wilson* v. *United States,* 221 U.S. 361, 380; *United States* v. *White,* 322 U.S. 694. While, as representatives of the State they may raise any objections which the State may have, the State is not endangered by loss of reputation or criminal prosecution. In his dissenting opinion in *Hannah* v. *Larche, supra,* 363 U.S. at 493, 496, Mr. Justice Douglas said that a person is entitled to cross-examination of witnesses giving information which is the basis of an investigation of himself before being required to testify since the investigation could lead to a criminal prosecution. Even if this view had been accepted, the registrars here have no right at this stage to cross-examine the persons who supplied information to the Attorney General because they could claim only the rights of the State and the State was not subject to prosecution.

3. Petitioners contend (Pet. 37–41) that, if the district court may not inquire into the background of the Attorney General's statement of the basis and purpose for his demand, then this is no longer a "case or controversy" under Article III, Section 2, and that therefore there is no jurisdiction in the federal courts

to issue an order such as the Attorney General requests. This claim, too, is clearly without merit. As the court of appeals held in *Kennedy* v. *Lynd, supra,* 306 F. 2d at 225:

> There are adversaries—the Attorney General seeking an order against the objecting State official as custodian. § 1974b. The dispute is real and present as the application seeks "appropriate process," § 1974d, in order "to compel the production" of records or papers demanded by the Attorney General in writing. § 1974b. That by its terms and operation, Title III narrowly circumscribes the issues upon which the Court is to act does not make the proceeding or that determination any less judicial.

See also *Coleman* v. *Kennedy, supra,* 313 F. 2d 867.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 938

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI ..... *Petitioner*

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF LEWIS, PETITIONER, TO KENNEDY'S BRIEF OPPOSING THE WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 938

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI — *Petitioner*

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES — *Respondent*

REPLY OF LEWIS, PETITIONER, TO KENNEDY'S BRIEF OPPOSING THE WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Throughout this Petitioner's reply to Respondent's brief in opposition to the issuance of the writ of certiorari, we will follow the same course adopted in our petition when we refer to Title III of the 1960 Civil Rights Act and any section thereof which consists of Section 301-306; said Title III is compiled as 42 USCA, Sections 1974, 1974a-e; in the petition (p. 14-15), the sections of said Act were correlated to the compilation thereof; reference to Title III will mean that Title of said Act; reference to any Section 301-306, inclusive, will mean that section of said Title of said Act and the corresponding section of the compilation; when a section

of the compilation is referred to, it will also mean the corresponding section of said Title III.

All emphasis in any quotation is supplied by Petitioner, unless otherwise stated.

GENERAL OBSERVATIONS UPON RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

A careful analysis of Respondent's brief in opposition does not disclose anything which should prevent the issuance of the writ. In fact, the contents of the reply — that part which does not deal with matters which are not even in this case — actually support Lewis's contentions that the writ should issue. The petition has fully covered and dealt with the matters which go to the heart of the question of whether this writ shall issue. Before taking up the various portions of the brief in opposition, there are certain matters which should be brought to the attention of the Court.

The petition asserted that all of the legislative history and the plain and clear language of Title III of the 1960 Civil Rights Act, 1974, 1974a-e, authorizes, by 1974d, this suit to be brought against Lewis. She is the sole defendant; she is the one who Title III and especially 1974d says is to be sued. The United States is not and never has been and cannot be a party-plaintiff in any suit brought under 1974d. Lewis is the only person who can be made a defendant thereto. Unquestionably, whenever any statute authorizes a suit to be brought against a person, and that person must be given *notice of the hearing* and is summoned to court in a judicial proceeding, a case or controversy, *then that person irrespective of who she is or what her relationship* to the subject matter of the suit may be is fully

authorized to defend the action and has a right to her day in court and to make full defense; and no valid judgment or order can be issued against that defendant unless the plaintiff proves his case by competent evidence.

Under these circumstances, the right of petitioner is inherent and implicit in her liability to be sued.

Therefore, the various claims by plaintiff, respondent here, that Lewis does not have all of the full rights of any defendant in any suit are totally unsound and without merit.

The position and contentions of Lewis is that under Title III she has all of the foregoing rights.

If any of said inherent rights are denied her, then she is also deprived of her rights under the due process of law clause of the Fifth Amendment to the United States Constitution. The due process clause is a limitation upon both the judiciary, legislative and executive. It is contrary to common reason and especially judicial processes to say that even though due process is a limitation upon legislation, a limitation upon the executive and a limitation upon the judiciary, still merely Lewis is the registrar, she does not have the full benefit of the protection of due process of law. The limitations above referred to act and apply even though there is then no existing case and no party defendant to any suit.

The Court will notice that Lewis's petition asserted that the Federal Rules of Civil Procedure applied to the proceedings had in the District Court giving Lewis all of the benefits thereof as any other party defendant —the Court will further notice that Respondent's brief in opposition does not controvert this — do they thereby

admit the correctness of Lewis's assertions — no other reasonable conclusion could be drawn.

Both parties in the District Court used and followed the Federal Rules of Civil Procedure. Respondent did not seek or move to strike any document filed by Lewis in accordance with said Federal Rules of Civil Procedure. All parties adopted this course.

In the Court Below, since both parties followed the Federal Rules of Civil Procedure and adopted them as governing and controlling the procedure, It does not lie in the mouth of Respondent to now deny that they do apply. There is nothing in said Title III which prohibits them. The petition heretofore filed herein clearly shown how and why they do apply.

The constitutional question raised by Lewis, as is apparent from the petition heretofore filed herein, is thus:

If the true meaning and legislative history of 1974d and the remainder of said Title III does not give Lewis the full rights and benefits of any ordinary and usual defendant in any other case, then to that extent 1974d and any other portion of Title III which deny her those rights or contributes to the denial to her of those rights are likewise violative of her rights to due process of law.

The Court may avoid the consfitational question by accepting the meaning of 1974d as we have stated it in the petition for certiorari and which is backed up and supported not only by the clear terminology but all of the authoritative legislative history which is clearly set out in the petition.

AS LEWIS, UNDER 1974d AND EVEN THE HOLDING IN KENNEDY VS. LYND, 306 F. 2d 222, THE CASE AT BAR, IS ENTITLED TO HAVE

NOTICE SERVED UPON HER IN THIS CASE SHE MUST BE GRANTED THE FULL RIGHT TO A HEARING AND ALL RIGHTS OF ANY OTHER DEFENDANT IN ANY OTHER CASE.

According to the opinion of the Fifth Circuit in *Kennedy vs. Lynd*, Lewis must have had notice served upon her in the 1974d proceeding; that is a necessary element which must be complied with according to *Kennedy vs. Lynd*. In such an instance, then she must be given the full rights to defend and assert everything that any other defendant could assert in any other case. This is squarely held by the line of decisions represented by the case of *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, 915-918.

In *Windsor*, suit was brought to condemn certain property of a person who lived within Richmond within the Confederate lines who was a Rebel. The proceeding was brought under an Act of Congress of July 17, 1862, 12 Stat. at L. 589, entitled "To Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels and For Other Purposes". Notice was served and the defendant filed his answer. On motion of the plaintiff, the answer of the defendant was stricken from the file and then a judgment by default was rendered. An appeal was taken to the U. S. Supreme Court. The Court reversed the holding of the Lower Court and held that any person against whom a suit is authorized to be brought has an *implicit and inherent right* to defend it with all of the accoutrements of defense authorized by law; and further held that whenever any person was entitled to notice in any case, then he is entitled to make answer and be heard and require the adverse party to prove his charges. The Court further held that if the party who is required to be

given notice, the defendant, is not heard, then the notice is ineffectual and the Court loses its jurisdiction.

The Court, speaking through Mr. Justice Field at page 915 of the Law Edition Report quoting from the case of *McVeigh vs. U. S.*, 11 Wall. 267, XX L. Ed. 81, says:

> "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus standi in that forum. If assailed there, he could defend there. *The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice.*"

Speaking further at page 916 of the Law Edition Report, Justice Field, for the Court, said:

> "The law is, and always has been, that wherever notice or citation is required, the party cited has the right to appear and be heard; *and when the latter is denied, the former is ineffectual for any purpose.*"

Lewis got the same treatment from the District Court and from the Fifth Circuit as did Windsor in the above case. Windsor's answer was stricken — Lewis's answer was not stricken, but the District Court followed *Kennedy vs. Lynd*, supra, and held that Respondent was entitled to the order for production of the documents and that Lewis could not be heard to defend herself and could not require plaintiff to prove his case and could not challenge or litigate or disprove the factual foundation for or the legal sufficiency of the reasons assigned by Respondent as entitling him to an order from the District Court making Lewis do what she otherwise did not have to do.

In common sense and honesty, the inevitable result and effect of the decision of the Courts Below is that they amount only *to an arbitrary sovereign edict*. The judgments and opinions of the Lower Courts in Lewis amount to no more and no less than the Courts rendered a judgment against Lewis without having heard and without having seen — *judicial judgment and decision cannot, under all and the fundamental law of this Nation, be an exercise of the judicial function under such circumstances.* Such decisions do not nurture or create respect and confidence of the people.

Windsor is squarely followed in the case of *Horen vs. Elliot*, 167 U. S. 409; 42 L. Ed. 215.

The Court in *Horen*, speaking through Justice White, says at page 415 of the U. S. Report, page 220 of the Law Edition Report, with reference to notice and the right to be heard:

> "Until notice is given the court has no jurisdiction in any case to proceed by judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to the party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. *It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.*"

In Hovey, supra, at page 418 of the U. S. Report and 221 of the Law Edition Report says through Justice White in quoting from *Ex parte Wall*, 107 U. S. 289, 27 L. Ed. 562:

"Again, in Ex parte Wall, 107 U. S. 289 (27:562), the court quoted with approval the observations as to due process of law made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case, 17 U. S. 4 Wheat 518 (4:629): by the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society'.

"'And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: '*The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry', and 'render judgment only after trial.*'"

The foregoing is, we submit, a total, complete and all-enveloping answer to any and all things contained in *Kennedy vs. Lynd, Kennedy vs. Owen*, 321 F. 2d 116, in Respondent's brief in opposition to the issuance of the writ of certiorari and wholly and totally sustains all claims made by Lewis that the Lower Courts erred in granting any relief to Respondent, Kennedy.

The foregoing should also, in our humble judgment, persuade this Court that the writ of certiorari should promptly issue and this case brought before this Honorable Court in an orderly fashion and there hear the matter in full upon Record and proper briefs.

We will now briefly take up each of the different sections of Respondent's brief in opposition and show that nothing therein contained should prevent the issuance of the writ of certiorari and, in fact, said brief in opposition is not correct in many of its statements, unintentionally made we are sure, and does not properly reflect the contents of the Record. The brief in opposition seeks, improperly we think, to push this case away from the 1974d proceedings and seeks to make this case one upon the 1974b demand or request for the records.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI EVIDENCES, WE THINK, EITHER A MISUNDERSTANDING OR DISREGARD OF THE DIFFERENCE BETWEEN THIS 1974d CASE FILED IN THE DISTRICT COURT BELOW BY RESPONDENT, PLAINTIFF BELOW, AND THE REQUEST OR DEMAND MADE BY RESPONDENT UNDER 1974b UPON DEFENDANT BELOW, LEWIS; SUCH MISUNDERSTANDING OR DISREGARD BY RESPONDENT HAS LEAD TO INACCURATE AND INCORRECT STATEMENTS IN RESPONDENT'S BRIEF IN OPPOSITION.

No proper solution of the questions in this case on this petition can be reached unless the difference and distinction between the 1974d case or suit, a judicial proceeding, filed by Respondent, plaintiff below, in the

U. S. District Court, and the request or demand made under 1974b by Respondent upon Petitioner is clearly recognized and understood. Said suit was begun by a complaint filed by Plaintiff below setting out conclusionarily the reasons why he alleged he was entitled to an order of the District Court to compel Petitioner to commit an affirmative act; that affirmative act was to force her to make available to Plaintiff below the voter records involved in this case — to commit an act which she was under no duty whatever to perform in the absence of an order of the District Court commanding her so to do.

The request or demand made by Respondent, plaintiff below, upon Lewis, Petitioner, under Section 1974b, seeking permission from her to inspect, reproduce and copy the voting records involved in this case, was and is solely and alone an administrative act of an executive officer. It created no duty or obligation of any kind upon Lewis to comply therewith. Upon her denial of Plaintiff's request, that request — its making and its denial — ended the administrative act — it became as such functus officio. Such demand or request did not and does not create any justiciable issue or any issue of any kind between Petitioner and Respondent.

The fact that Petitioner, plaintiff below, chose to allege in his 1974d complaint as his reasons why he was entitled to the court order the same words which he set out in his letter of request or demand under Section 303, 1974b, *does not and cannot make* the 1974d case or controversy, the judicial proceeding, *into an administrative act.* If it should make the 1974d proceedings into an administrative or investigatory proceeding, then the District Court would not have jurisdiction of a 1974d proceeding because Article III, Section

2 of the Constitution of the United States, restricts the jurisdiction of Federal Courts to cases and controversies. Respondent himself says the 1974d suit is a case or controversy — he had to.

In view of the foregoing, it is clear that the 1974d complaint in a case or controversy remains a judicial proceeding irrespective of where the language alleged in the complaint came from, and irrespective of where or in what such language had been used. When Lewis denied the request of Respondent, plaintiff below, he had no further power or authority to secure those records in or by virtue of himself or his office.

The only thing which could get the records for him was an order of the District Court, and which can only be made in a case or controversy.

We emphasize the foregoing because we believe Respondent's mistaken understanding of 1974b and 1974d of said Title III; or his having ignored that difference, has caused him to erroneously and improperly assert that Petitioner is attacking the demand or request made under 1974b, *or to say that said demand or request itself as such is involved in the case at Bar*., if so he says.

Respondent's misunderstanding or lack of understanding or disregard of the difference and distinction between the demand under 1974b and the case or controversy commenced by his complaint under Section 305; 1974d, is, we believe, the reason *why he has erroneously and mistakenly said in his statement of the "questions presented", page 2 of his brief, that 1974b is involved in this case.*

With 1974b removed from the brief in opposition much, if not most of it, collapses.

RESPONDENT'S RECOGNITION, ASSERTION, OR ADMISSION THAT HE AND HIS PREDECESSOR ATTORNEY GENERAL HAD NO POWER OR AUTHORITY TO ADJUDICATE ANYTHING ABOUT ANYTHING OR MATTER IN OR ABOUT OR CONNECTED WITH THIS CASE, IS MOST SIGNIFICANT; SUCH LACK OF POWER TO ADJUDICATE SHOWS CONCLUSIVELY THAT PETITIONER, LEWIS, IS CORRECT IN HER CONTENTION THAT NO RELIEF SHOULD HAVE BEEN GRANTED TO RESPONDENT BY ANY COURT.

At page 9 of his brief in opposition, first two lines, Respondent recognizes, and asserts and admits that neither he nor his predecessor Attorney General has any power to adjudicate anything about anything in this case. Respondent's language is: "Indeed, the Attorney General has no power to adjudicate; * * *."

We congratulate Respondent upon his candid statement of his and his predecessor's lack of power or authority to adjudicate anything about anything in connection with this case under the contents of this Record in view of *Hannah vs. Larche*, 363 U. S. 420, 4 L. Ed. 2d and cases therein cited.

Furthermore, such lack of power or authority to adjudicate anything about anything in this case, leaves the allegations of Respondent's unsworn, unverified 1974d complaint in the District Court stating the reasons why he was entitled to an order of the District Court commanding Lewis to make said records available for production, inspection and copying *no more than mere allegations* — it was not supported by any affidavits or sworn statements — with no more force and effect

than mere allegations which had to be proven by competent evidence in open court subject to counter-evidence which Lewis had a right to adduce and would have adduced, if necessary, in contradiction of Respondent's evidence pursuant to her denials of said reasons in her answer to the complaint filed in this cause. Lewis did not waive Respondent's obligation to adduce evidence to prove his allegations or meet the requirements stated at page 29, paragraph 1 of Lewis's petition; Lewis did not waive her right to introduce counter-evidence.

Respondent failed and refused to even offer evidence when given the opportunity so to do. The order of the District Court was therefore violative of the due process clause of said Fifth Amendment to the U. S. Constitution. *Thompson vs. City of Louisville*, 366 U. S. 199, 206, 4 L. E. 2d 654, 659 and cases cited in fn 13, p. 659.

Lewis was erroneously denied her *inherent and implicit* right as a defendant to defend herself against Respondent's charges made in a proceeding under 1974d which *permitted her and her alone* to be made the sole party-defendant. *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Hovey vs. Elliot*, 167 U. S. 409, 413-419, 42 L. Ed. 215, 219-221 and other cases in this line of authorities.

In addition, this also violated Lewis's right of due process of law in that, among other things, it deprived her of her freedom of restraint from an order of a Federal District Court which commanded her to do an act which she was not otherwise obligated to do without giving her a day in court, a right to be heard, and without the right to require the plaintiff to prove his case and the right to cross-examine the witnesses and any documentary evidence which he should have offered.

LEWIS'S REPLY TO RESPONDENT'S STATEMENT OF "QUESTIONS PRESENTED".

No attack is made upon Section 1974b in this case and same is not involved herein so, therefore, any reference to or mention of any request or demand made under that section should not be included in the statement of any questions. Our statements above apply to all three of the questions as stated by Respondent.

Taking said questions *with everything about 1974b and a demand out of them*, it appears to us that Respondent seeks to inject into the remainder thereof something about a motion for a more definite statement — if this he does, then that, too, should be eliminated from the questions because the motion for a more definite statement once granted, but later denied, is not involved in this 1974d case in any respect whatever.

Considering said questions after the elimination of the two foregoing matters, they are not clear to us but, on the other hand, are abstruse.

Without attempting to parse them, Petitioner, Lewis, says that what she is contending in this case is that as clearly and definitely stated in her petition for certiorari in those portions thereof entitled "Statement of the Case", (P. 11-22) "Questions Presented", (P. 7-9) both as supplemented by her introductory statement (P. 2-5; statement and argument under the heading of "Reasons for the Issuance of the Writ"; (P. 22-52) and that plaintiff below, Respondent here, should have been required to prove the allegations of his complaint, stating the reasons why he was entitled to have the District Court enter or issue an order requiring the production of the documents referred to or that he must have alleged and proven to the satisfaction of the Court in the light

of any contradictory evidence adduced by Petitioner that he had reasonable grounds for believing that certain voters are being discriminatorily denied their voting rights in Bolivar County, Mississippi, or, as same is otherwise stated at paragraph 1, page 29, of Lewis's petition for certiorari; and that Lewis should have been granted the right to her day in court, a full hearing upon the complaint with full right to adduce evidence and cross-examine any evidence or witnesses adduced by plaintiff.

When thoughtfully considered and properly analyzed, Lewis has not and does not now contend that plaintiff below, Respondent here, had to allege and prove in fact a violation of Title 42, 1971a or 1971b, or both.

Lewis further says that her motion to dismiss the complaint for failure to state a claim (R. 65) and her motion for the entry of a decree in her favor (R. 150) should have been granted when plaintiff failed and refused to put on evidence to prove his said allegations which the Court said meant that plaintiff was taking the position of making a request for a judgment on the pleadings.

Lewis's reply to that portion of the brief in opposition entitled "Statement".

The foregoing section of the brief in opposition appears at pages 4-6, inclusive. There are a good many inadequacies and insufficiencies and, in fact, some incorrect statements in this portion of Respondent's brief.

Reference is made to a motion for a more definite statement — as heretofore stated, that is not involved in this case before this Court in any respect and should be disregarded.

Respondent *failed to include in his said statement that in her answer, Lewis denied in detail the allegations of the complaint whereby Respondent, plaintiff below, alleged the reasons why he was entitled to an order from the District Court requiring production of the documents involved — Respondent fails to mention that those denials were made.* The allegations of the complaint of said reasons and Lewis's denials thereof appear in quoted form at pages 16 (reference to them is here made by identification) and at pages 17 and 18 of Lewis's petition for certiorari.

Respondent's omission of any mention of Lewis's denials of the aforesaid reasons alleged in Respondent's complaint below causes his "Statement" to apparently erroneously negate the fact that Lewis did make said denials, that issues of fact were made thereby, that she was never given an opportunity to prove her denials; also, the omission of reference to Lewis's denials could be taken, from Respondent's "Statement" to show that there were no allegations in the complaint which, under the pleadings, *Respondent should have proven by competent evidence.* Taking Respondent's "Statement" at its face value, it would indicate that the case went off in the District Court solely on the motions actually mentioned by Respondent in his said "Statement" — his failure to mention Lewis's motion for a decree as above mentioned would, if the "Statement" is taken at face value, indicate that no such motion had ever been made.

There is no explanation in Respondent's "Statement" that such motions of Petitioner as he did mention were overruled by the Court solely because he followed *Kennedy v. Ingid* — with which he said, however, *he did not personally agree but felt bound thereby* — Respondent could more properly have said that said motions

were overruled on the basis of *Lynd* and that the merits thereof were not passed upon because *Lynd* held that Lewis could not test the legal sufficiency of the said reasons alleged in the complaint as aforesaid.

We *regret* Respondent's assertions in his "Statement" about the motion for a more definite statement when that is not involved in this case at all and, furthermore, we are forced to say that we disagree in fact with Respondent's statement that the U. S. District Judge Clayton *did not set or agree to set* Respondent's motion to reconsider the Court's ruling on the motion for a more definite statement until Respondent had filed a petition for a mandamus — such a statement is totally disproved by a letter from Judge Clayton addressed to Burke Marshall, of the Department of Justice, dated June 8, 1962, a copy of which was attached to the answer and supporting brief of Judge Clayton in said mandamus proceeding and thereby Judge Clayton shows that he had agreed to a setting of said motion to reconsider with the U. S. Attorney Ray some while before the filing of the petition for mandamus and that Judge Clayton understood from Ray it had been mentioned to and was agreeable with Mr. Marshall. Out of fairness of Judge Clayton, this letter is made Appendix A to this. Lewis's reply, and it speaks for itself; the order referred to by Respondent (R. 129) is predicated upon that letter and nothing was added to or subtracted from it by the conference of attorneys suggested by the sitting panel of the Fifth Circuit with Judge Rives presiding when the panel had read Judge Clayton's letter.

We submit that Petitioner's said statement of the case supplemented as aforesaid constitutes a correct statement thereof and covers everything involved in this case before this Court.

LEWIS'S REPLY TO RESPONDENT'S "ARGUMENT".

This portion of the brief in opposition covers pages 6-10, thereof.

Lewis's petition for certiorari consisting of her argument and presentation of the "Reasons for the Issuance of the Writ", pages 22-52, inclusive, fully answers all assertions made by Respondent in this section of his brief but thereasto Lewis says also:

There is no substance to Respondent's assertions about Title III giving him "ready access to state voter records in order to prevent denial of the right to vote based on race". The legal question and point always involved in statutory construction is what did Congress provide for in clear and unequivocable terms — Section 1974d contains everything in Title III which Respondent could make use of in securing voter records. We have fully discussed it in the petition and in this reply.

Respondent tries to make something out of what he called "delay", but a fotal and sufficient answer to that is that the Fifth Circuit or its Chief Judge, Tuttle, *granted Respondent a stay in this case before this Court*, the terms of which have been complied with so that this Court may determine or decide this petition for a writ of certiorari in an orderly manner — certainly Judge Tuttle did not think that Respondent had been unduly delayed or, in fact, delayed in the trial of this case because otherwise he would not have added to that delay by granting the stay. Furthermore, the stay is significant in that it demonstrates that Judge Tuttle thinks there is much substance to the contentions made by Petitioner and that this is a case in which he thinks the Bench

and Bar would benefit by a decision upon the merits hereof.

At sub-section 1 of Respondent's "Argument", page 6 of the brief in opposition, Respondent seeks to bring in 1974b again, even though he knows or should know that it is not and never has been involved in this case before this Court upon this petition for certiorari; at this point in Respondent's "Argument", he seeks to say what we assert under and in connection with 1974d — we are not clear exactly what Respondent means by these assertions, but Lewis says she asserts that under 1974d, she is entitled to have Respondent prove in open court by competent evidence, as in the ordinary civil case in a U. S. District Court, the allegations of his complaint — together with the other matters and under the conditions and with the rights as heretofore set out in Lewis's petition for certiorari and referred to in her petition herein (See also p. 29 of the petition). If Respondent will check his own allegations in his complaint, he will see what we say should be proved; or that he should prove what we set out at page 29 of the petition for certiorari; Lewis also says that she should have all of the rights incident to her defense under the Federal Rules of Civil Procedure.

Respondent speaks of 1974d proceedings being of "summary nature". We have fully answered this in the petition for certiorari, both by demonstrating that there is nothing summary about it, either by the terms of the Act or the legislative history. But, in any event, insofar as due process is concerned, *summary proceedings require the observance of both substantive and procedural due process as shown by the following cases:*

Bradley vs. St. Louis Terminal Warehouse Co., 189 F. 2d 818, 824; *Hicklin vs. Edwards*, 226 F. 2d 410.

413; *In re Central Railway Co. of New Jersey*, 136 F. 2d 633, 639; *Commissioner of Internal Revenue vs. Bain Peanut Co. of Texas*, 134 F. 2d 853, 858, 859 (5 Cir. 1943).

Here again, Respondent refers to 1974b and as we have repeatedly said that statute is not involved in this case before this Court in any shape, form or fashion so what it does or does not do is totally immaterial.

At page 7 of his brief in opposition under the section "Argument", Respondent refers to several cases from the Fifth Circuit, all of which deal with Title III except *U. S. vs. Lynd*, 301 F. 2d 818, which was a Title 42, U. S. C., 1971a case.

As to all of the other cases, we say unequivocably that none of them presented the factual pleading or record aspects of Title III as are contained in *Kennedy vs. Lewis* now before this Court. *Again, please let us say that the denial of certiorari means nothing insofar as determining the correctness or incorrectness of the decisions of the Court Below.* This Court has the records of all cases mentioned by Respondent in which certiorari was denied. Among the differences are:

In *Kennedy vs. Lynd*, 306 F. 2d 222, 226 (C.A. 5), cert. den. 371 U. S. 952, as Respondent knows the records involved had actually been inspected, reproduced and copied before the petition for certiorari was filed so, therefore, that petition was mooted before ever being presented.

Likewise, *Dinkins vs. Attorney General* (Ala. ex rel Gallion vs. Rogers) 187 F. Supp. 848, cert. den. 366 U. S. 913, the records had been inspected, reproduced and copied before the petition for certiorari was filed — see page 4, paragraph 3 of the petition for certiorari in

that case, being No. 823 at the October, 1960, Term of this Court. Thus, "mooting" the petition before the case was presented to this Court.

Also, in Crum Dinkins, the record shows at page 54 and 55 that both plaintiff and defendant said they had no evidence to offer — nothing like that was said by Lewis in this case before this Court.

In *Coleman vs. Kennedy*, 313 F. 2d 867 (CA 5), cert. den. 373 U. S. 950, the printed record shows at page 77 that both parties did not wish to offer any testimony — Lewis never made any such statement in the case at Bar — in fact, she preserved her right to offer evidence.

In sub-section 2 of page 7 of the brief in opposition, Respondent again mentions Section 1974b which is not in this suit.

At pages 7 and 8, Respondent asserts what he says Lewis requires the Respondent to "disclose" — we merely refer to other portions of this reply and our statements in the petition for certiorari as to what plaintiff must allege and prove — and, incidentally, which is not what Respondent says on this point in his brief.

At paragraph 1, page 8, of the brief in opposition, Respondent says to that the United States surely has the right to inspect and copy these official records pursuant to statutory authorization without a full trial of the need for the records — in response to this, we repeat as we have previously said, that the United States is not and cannot become a party to a 1974d proceeding — the Attorney General is the only party — he is not the United States — never has been and, I assume, never will be — *again, we say that Lewis does not assert* that there must be a "full trial of the

need for the records"—the "need" as such for the records is totally immaterial—though we are not sure what "full trial" means, but I think the gentleman is trying to say that Lewis asserts that before the records can be seen or an order secured for their inspection, Respondent must prove a violation of Title 42, 1971a or 1971b, or both — if so, that is not what Lewis contends — her contentions have been heretofore fully and too frequently mentioned.

By Respondent's asserted recognition, as he must recognize, that the Attorney General has no power or authority to adjudicate anything about anything in this suit, that takes the case of *Hannah vs. Larche*, 363 U. S. 420, entirely out of the case at Bar.

We violently disagree with both the intimation or assertion. A 1974d proceeding is an investigatory proceeding instead of a case or controversy — a judicial proceeding.

At page 9 of the brief in opposition, paragraph 1, Respondent refers to the cases of *Wilson vs. U. S.*, 221 U. S. 361, 380, and *U. S. vs. White*, 322 U. S. 694, as authority for his assertion that Lewis has no right to object to the surrender of these records; and that the records belong to the State and at page 8, paragraph 1, line 6, Respondent says the records are official records.

There is absolutely no substance to the foregoing assertions and the cases so show.

In *Wilson*, he asserted the plea against self incrimination as the basis for his refusal to surrender the books which belonged to the United Wireless Telegraph Company — *Wilson was not summoned or subpoenaed to produce the books* — the subpoena ran against the Telegraph Company — it was merely served on Wilson —

he appeared with the books, but refused to surrender them. He was charged with contempt and convicted and, finally, habeas corpus was denied — Wilson claimed the books would incriminate him — the corporation, directors, approved the surrender of the books. An important factor is that the books were ordered produced by the corporation under a subpoena which created a duty to do so. Incidentally, a subpoena affords due process and an opportunity to quash it.

The *White* case, supra, also involved the plea against self-incrimination under the Fifth Amendment to the U. S. Constitution. The Grand Jury was investigating a Union — a Grand Jury subpoena was issued, addressed to the Union and served on it by service on the president. White showed up with the Union's books and objected to their delivery to the Grand Jury on the ground that such might incriminate him. It is interesting to note what the Court said at page 697 of 322 U. S., 88 L. Ed. 1545, as to what is the only issue in the case, and it is:

> "*The only issue in this case* relates to the nature and scope of the constitutional privilege against self incrimination."

No subpoena had been issued against White.

The foregoing shows these cases are not applicable to the case at Bar.

A sufficient reason for their inapplicability to this case is that there is no similarity in the operation and applicability, breadth and scope of due process of law under the Fifth Amendment and the privilege against self-incrimination under that Amendment. Self-incrimination is a personal privilege to be exercised by the person himself.

Due process of law is a limitation upon the legislative, executive and judicial branches of the Government. It is self-operating and self executing.

Respondent appears to assert what we think is one of the most frivolous ideas we have ever heard of when he seems to say that Lewis can "raise" only any objections which the State may have — and these records belong to the State." What Respondent is really trying to do is to say that Lewis cannot defend this 1974d lawsuit. The State is not a party to this lawsuit and cannot be made a party. The Attorney General of the United States under said Title III has no power or authority to sue the State of Mississippi under 1974d or any other portion of said Title III. This fantastic idea which Respondent grasps at is so unsubstantial we hesitate to dignify it with a response. We do respond to it because if we don't, somebody might think we do not *disagree with it.*

Among the reasons why Lewis can defend this lawsuit is that 1974d authorizes her and only her to be sued in connection with the Respondent's efforts to try to inspect and reproduce the records which he could not do and cannot do without a court order. Respondent is here saying that a person who a statute authorizes to be sued can't defend the lawsuit brought against her pursuant to that statute. If anyone ever gave serious thought to that kind of a proposition, they would immediately know that it is contrary to the *Windsor* and *Hovey* cases and contrary to every principle of law in the United States. Furthermore, it probably would rise to the dignity of a Bill of Attainder or Pains and Penalties — 1974d shouldn't be permitted to be placed in that catagory.

Furthermore, we cannot think of a more gross violation of due process under the Fifth Amendment than to say that Mrs. Lewis, we are given a right to sue you under 1974d, but you can't defend the lawsuit.

Incidentally, in her petition, Lewis asserted that in addition to all of the other rights she had to defend the lawsuit, she could do so as a bailee for hire of said records—Respondent has not denied this.

We deny that these voter records belong to the State of Mississippi. If Plaintiff asserts that then why doesn't Respondent try to bring a suit against the State of Mississippi under Title III? Petitioner does not think he would ever put himself in that position — Respondent could not even sue the State of Mississippi under the 11th Amendment to the U. S. Constitution under the diversity provisions of the Constitution and statutes — what does Respondent do with the requirement of jurisdictional amount? — I assume he is a citizen of Massachusetts.

Respondent is evidently quite worried and disturbed about the fact that a violation of 1971a or 1971b can be prosecuted by the Attorney General on his own initiative and under his own power without a Grand Jury indictment for a violation of Title 18, USCA, Section 242.

Respondent has asserted that the records are official records. If he thinks that helps him in trying to defeat Petitioner's right to defend this 1974d suit, he should inquire around in Washington where he can readily find exclusive of Security records, a whole lot of official records which not too many people have an opportunity to look at and who would certainly have the power to defend any suit involving those records, even though there was no statute in existence comparable to 1974d.

There comes to our mind many records of this Supreme Court, the Executive Department and other departments, which are not open to any except those who the possessor thereof chooses to permit to inspect and/or copy them.

As we read and understand Respondent's brief in opposition, he does not raise, does not assert and does not content that the voter records involved are "public records" — Respondent is quite correct in not raising or asserting that point for, of course, in this State, those records are not public records; a court cannot make records public records, even though they be official records. That can be done solely and alone by the State Legislature. Such records are not public records in Mississippi. We congratulate Respondent for not making or asserting the claim that said records are public records in Mississippi; he is due this compliment for realizing that fact and not asserting them to be public records. If anyone thinks that what Respondent has said in his opposition constitutes an assertion that said records are public records, and if such is taken seriously, then we humbly ask the Court to give us an opportunity to respond thereto before any determination is made on such assertion.

A SERIOUS QUESTION OF JURISDICTION OF THE DISTRICT COURT, THEREFORE OF THE FIFTH CIRCUIT AND OF THIS COURT IS PROMINENT IN THIS CASE.

We have fully covered this point in the opening portion of our "Statement of the Case" at pages 11-14 thereof.

We submit that before a Federal District Court can have jurisdiction of any judicial proceeding, it must

be and constitute a case or controversy; see foregoing portion hereof and Ps. 10-12 of Lewis's petition and the cases of *Muskrat* and *Tuten*, in Lewis petition.

If this be true, we think that if, as and when the case or controversy *ceases to exist* in that which began as a case or controversy, *then at that point jurisdiction ceases.* In the case at Bar, that point was reached, if *Kennedy vs. Lynd*, supra, be accepted by this Court, prior to the issuance of the order or judgment of the District Court (App. 2 to Lewis's petition — A8-10).

FURTHER COMMENT UPON CASES RELIED UPON BY RESPONDENT (RESP. BR. IN OPP. P. 9), BRUCE, KENNEDY VS. LYND, DINKENS AND COLEMAN; AND FURTHER DISTINGUISHING THOSE CASES FROM LEWIS.

The above cases are cited and relied upon by Respondent in his brief in opposition at page 7, paragraph 2 thereof — *they do not help him.*

At pages 20-22 of Lewis's reply to Respondent's brief in opposition to the issuance of the writ of certiorari, we gave some differences and distinctions between the case at Bar and those said cases. We now proceed to make further comment upon said cases relied upon by Respondent and to give further points of difference and distinction between them and this, the Lewis case.

Kennedy vs. Bruce, 298 F. 2d 860, 863 (CA5) — this case has no application to the case at Bar. It was decided in the District Court and in the Fifth Circuit upon only a motion to dismiss. Such motion of Bruce with some supporting affidavits — *but no motion* for a *summary judgment* or a *judgment on the pleadings*

was asked by either party and the rule or rules thereasto were not applied by either Court.

If Bruce were to be relied upon in the case at Bar, then the District Court in Lewis and the Fifth Circuit should have dismissed the complaint and granted no relief whatever to Kennedy against Petitioner because Bruce holds that the filing of a 1974d proceeding says and holds at page 863 of the opinion, first sentence in last paragraph of lefthand column, as follows:

> "The procedure established under Title III of the Civil Rights Act, under which the Attorney General proceeded in the District Court, does not amount to the filing of a suit of any kind. This we decided in State of Ala. vs. Rogers, supra."

Therefore, if a 1974d suit does not amount to a "suit of any kind", there is no jurisdiction in the District Court or the Fifth Circuit under Article III, Section 2, of the Federal Constitution. Furthermore, if that is what the Fifth Circuit held several years previously in Crum Dinkens (the same as Ala. vs. Rogers), then any judicial vitality which anyone thinks should attach to Crum Dinkens is totally destroyed. Article III, Section 2, of said Constitution was not raised nor any question thereon involved in either of said cases. No petition for certiorari was ever filed in Bruce.

Kennedy vs. Lynd, 306 F. 2d 222, 226 (CA 5), cert. den. 371 U. S. 952. In our petition, we said Kennedy vs. Lynd had no judicial vitality because nothing was decided in the District Court which affects this Lewis case in any shape, form or fashion. The District Judge merely opined, and ordered that he would not consider either the complaint or any motions filed by the defendant in that Lynd case because the complaint had been

abandoned by Kennedy by virtue of his having filed and secured certain documents under a Rule 34 in *U. S. vs. Lynd*, 301 F. 2d 818, 822.

Such orders of the District Court are made Appendices 10 and 11 to Lewis's petition for certiorari and appear at pages 37-40 thereof (includes both the opinion of the Court and the order remanding the case to the files).

In *Kennedy vs. Lynd*, the answering stage was never reached and the record in the District Court and the Fifth Circuit which exists in this, the Supreme Court, as No. 576, October 1962 Term, shows the foregoing:

Thus, the only question before the Fifth Circuit upon the Record was whether the District Court did or did not err in remanding the case to the file. *However, in utter and total disregard of the restrictions upon its Appellate jurisdiction and in violation of and in conflict with decisions of this Court, other Circuits and even of its own Circuit, the Fifth Circuit proceeded to exercise original jurisdiction and held, decided and passed upon matters that had never been submitted to the District Court and on which it had never made any decision, insofar as anything applicable to this, the Lewis case now before this Court.* There were not and could not be issues of fact in Kennedy vs. Lynd.

Alabama ex rel. Gallion vs. Rogers, 187 F. Supp. 848, 854, (M. D. Ala) affirmed sub nom *Dinkens vs. Attorney General*, 285 F. 2d 430 (C.A. 5), cert. den. 366 U. S. 913. (We refer to this case throughout the petition for certiorari and this reply as Dinkens or as Crum Dinkens).

In our comment upon *Bruce*, supra, we show an additional reason why Dinkens is not applicable to or persuasive upon this Court in this Lewis case now before this Court. In addition thereto, we submit the following:

If as said in Bruce, Dinkins holds that the 1974d proceedings is not "a suit of any kind", then there was no jurisdiction to grant any relief to Kennedy in the District Court or in the Fifth Circuit and the case should have been dismissed for lack of jurisdiction under Article III, Section 2, of the Federal Constitution.

The due process of law clause of the Fifth Amendment was mentioned in Dinkens but the Record thereof in the District Court as printed for the Fifth Circuit and as filed here in this Supreme Court shows that due process was never argued in the District Court and never seriously or really briefed in the Fifth Circuit or this, the Supreme Court.

Furthermore, as heretofore shown, both parties announced to the District Court, as shown by the Record, supra, that neither had any evidence to produce — thus, it is clear that even though there was an answer filed in Dinkens by him and the other registrars involved, his statement that he had no evidence to produce would unquestionably negate or have the legal effect of nullifying or probably withdrawing his answer and any denials therein.

Furthermore, Dinkens shows from the Record in this Court as above mentioned, that as before this, the Supreme Court, Dinkens had been mooted before the filing of the petition for certiorari therein because the records had been inspected prior to the filing of such petition.

Thus, there were no issues of fact in Bruce and could not have been because no answer was filed.

Coleman vs. Kennedy, 313 F. 2d 867 (CA 5), Cert. den. 373 U. S. 950.

Further, as to this case, we say thus:

The announcement at page 77 of the Record in Coleman, as printed for the use of the Fifth Circuit, and as filed here on the petition for certiorari appears the statement that neither party had any evidence to offer negated the existence of any question of fact existing before the District Court and this Supreme Court — thus, constituting either an abandonment or withdrawal of the answer of Coleman denying the allegations of Kennedy's complaint therein by which he alleged the reasons why he was entitled to an order of the District Court compelling Coleman, to do that which he was not otherwise required to do, to make the records available to Kennedy — thus, there could not have been an issue of fact before the District Court or this Court, the District Court decision would have been the same however because in Coleman, supra, the District Judge followed Kennedy vs. Lynd, thus the latter is mortally infected with the same lack of judicial validity which we say kills Kennedy vs. Lynd as any precedent or holding.

RESPONDENT PERSISTS IN SEEKING TO ERRONEOUSLY MAKE THIS CASE NOW BEFORE THIS COURT INTO ONE INVOLVING ONLY THE LETTER OF DEMAND, OR THE DEMAND UNDER SECTION 1974b *INSTEAD OF* MEETING THE CASE AS MADE BY THE RECORD AND LEWIS'S PETITION FOR CERTIORARI AS ONE INVOLVING ONLY THE 1974d JUDICIAL COURT PROCEEDINGS AS A CASE OR CONTROVERSY.

At line 15 from the bottom of page 7 of his brief in opposition, we ask the Court to take special notice of and recognize the significance of these words quoted from said brief in opposition — "And letters worded

identically to this one have been held to be sufficient in" * * *. Then, Respondent recites the above mentioned cases of Bruce, U. S. vs. Lynd, Kennedy vs. Lynd, Dinkens and Coleman, supra. As we understand the above quoted words, they are saying all of the afore cited cases support the sufficiency of the Section 1974b administrative act composed solely and alone of the demand by the letter of demand made under Section 1974b.

As we have frequently said herein, said Section 1974b is not involved in this case in any shape, form or fashion.

To us, this evidences that Respondent persists in trying to make this into a 1974b case dealing only with the administrative act of the written demand or request by Respondent upon Lewis for permission to inspect, etc. said records. THIS IS NOT A 1974 b CASE.

This Court should not permit itself to be persuaded to view this Lewis case now before it upon any basis except that which it actually is, a Section 1974d suit, case or controversy. It is not a proceeding involving the administrative demand act of an executive officer under said Section 1974b — in or as to which, as Petitioner asserts and as Respondent asserts and admits, Respondent cannot adjudicate anything about anything in this case.

If there be anything in Respondent's brief in opposition which is not covered by this reply of Lewis, then we refer the Court to the contents of Lewis's petition for certiorari.

CONCLUSION

In view of the foregoing, we respectfully request the Court to issue the writ of certiorari prayed for by Mrs. Lewis, Petitioner herein.

If there be any points or questions in this cause upon which the Court desires additional memoranda or briefs, we will be glad to comply with the desire of the Court.

Respectfully submitted this 6th day of May, 1964.

WALTER SILLERS, Attorney
Rosedale, Mississippi

JOE T. PATTERSON, Attorney General
of the State of Mississippi

DUGAS SHANDS, Assistant Attorney
General of the State of Mississippi
New Capitol Building
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CERTIFICATE OF SERVICE

I, the undersigned, Dugas Shands, an Assistant Attorney General of the State of Mississippi, one of the Attorneys of Record for Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby that I have this day mailed, Air Mail, a true copy of the foregoing Reply of Lewis, Petitioner, to Respondent's opposition to the granting of the issuance of the writ of certiorari to the following Attorneys of Record for Respondent: Harold H. Greene and Gerald P. Choppin, Attorneys, Civil Rights Division, Department of Justice, Washington, D. C., and to Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D. C. and have this day mailed, air mail, special delivery, forty copies of said Reply of Lewis, Petitioner, to Respondent's opposition to the granting of the writ of certiorari to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D. C., for filing in this cause, all of above documents postage prepaid.

DONE AT JACKSON, MISSISSIPPI, this the 6th day of May, 1964.

DUGAS SHANDS

APPENDIX A

A copy from the chambers of
CLAUDE F. CLAYTON
United States District Judge
Tupelo, Mississippi
8 June, 1962

Post Office Box 252
Honorable Burke Marshall
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Re: In re Mrs. Walter Lewis
D.C. 1-61
Northern District of Mississippi

Dear Sir:

This will acknowledge receipt of your letter of June 7, 1962, and the copies of the following which were therein enclosed: (1) Motion for Leave to File Petition for Writ of Mandamus; (2) Petition for Writ of Mandamus and (3) Motion to Advance, which you have filed with the Court of Appeals for the Fifth Circuit. I want you to understand that I do not at all object to you or anyone else applying to the Court of Appeals for a Writ of Mandamus against me in this or any other case. However, I was very much surprised, to say the least, at your taking this action in this case for the reasons which I will briefly state.

When I received your letter dated April 11 about this case, I received almost immediately the letter of April 16 from Honorable Dugas Shands, Assistant Attorney General of the State of Mississippi, and promptly there

after I conferred with Honorable H. M. Ray, United States Attorney for the Northern District of Mississippi, to explore with him the condition of my calendar so that we might determine a date upon which the matter could be heard in view of the request for an opportunity to be heard made in the aforementioned Shands letter.

Page 2 When these letters were received, I was sitting at Aberdeen at my regular April Term of Court in which I had calendared cases for trial for every available day there. Even so, there were approximately twenty cases on the call calendar which could not be reached for setting at that term. I was scheduled to and did go to Oxford for my regular May Term there immediately following the last day of the April Term at Aberdeen. I was required at Oxford to calendar cases and other matters through June 4 and at every available opening I was required to go back to Aberdeen to resume hearings in rather massive litigation which involved, among other things, the ownership of a very valuable patent, and I was able to wind up the taking of evidence in that case on Tuesday, June 5. I was able to bring my work to a close at Aberdeen on Wednesday, June 6.

Mr. Ray was familiar with my calendar situation and our first serious discussions with respect to a setting of this matter was concerned with a period of time when he was scheduled to go on fifteen days active duty with the Air Force at the Pentagon. And, I am scheduled to go on fifteen days of active duty for training with the National Guard beginning Sunday, June 24. As I understood Mr. Ray, it was his desire to be present with the representatives from your office at the time of the presentation of the pending aspects of this case to me. And in view of the situation which I have thus outlined briefly, he and I had tentatively agreed that the matter

would be orally presented to me in mid July concurrently with the session of the Grand Jury which we normally have during that month.

[page 3] Upon his return from active duty, I again discussed this matter with Mr. Ray this week, and I was then informed by him that he had discussed it with you briefly in Washington and that he had advised you that the matter would be for hearing in mid July during the time when our Grand Jury would be in session. I got the impression from him that this seemed satisfactory to you. I may have misunderstood him, or he may have misunderstood you. At any rate, let it be said that no one had ever informed me that there was particular urgency of any sort about a hearing on this matter. It is probable that I could have arranged such a hearing at an earlier date than the one tentatively fixed in conference with Mr. Ray. This I would have been glad to consider if request therefor had been made to me.

Again let me say that I have no objection to your application for mandamus to the Court of Appeals. I simply wanted you to have, as apparently you have not had until now, a picture of the situation from my viewpoint.

With best wishes and personal regards, I am

Sincerely,

Claude F. Clayton

CFC:mg

cc: Hon. H. M. Ray
Hon. Dugas Shands
Hon. W. C. Roberts
Hon. W. H. Bizzell